H. H. Alexander
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In the Supreme Court of Georgia.

OCTOBER TERM, 1913.

LEO M. FRANK,
Plaintiff in Error.

Versus

STATE OF GEORGIA,
Defendant in Error.

No. 18.

In Error from Fulton Superior Court.
Conviction of Murder.

IN ERROR FROM FULTON SUPERIOR COURT.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

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THE BLOSSER CO., ATLANTA

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DESCRIPTION OF PREMISES.

The National Pencil Company operates a factory on South Forsyth Street, in Atlanta, Georgia. It occupies a basement and the three top floors of a four-story building. The entrance is, of course, on the ground or street floor, and the ascent to the upper floors is made by means of stairways and an elevator. There is a basement which is reached by the elevator and also by a ladder going down through a scuttle hole. This basement contains the

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STATEMENT AND ARGUMENT OF THE FACTS.

LEO. M. FRANK was convicted of murder and sentenced to death at the July Term, 1913, of Fulton Superior Court. His motion for new trial was overruled and the case is now before this Court for review.

A number of the grounds of the motion relate to the insufficiency of the evidence and in the discussion of other grounds the sufficiency of the evidence also becomes material. Therefore the facts of the case will be first presented and discussed.

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boiler which furnishes heat for the building, and also contains the toilet for the colored help, contains a trash pile, a sawdust bin, and has other features which may be hereafter alluded to as the occasion requires. The basement is also reached by a stairway from a hall in the rear, on the ground floor of the building, and there is also a chute which reaches this basement from the rear, on the ground floor, and which was at one time used for delivering goods. The basement opens out on a back alley by means of doors. When the doors are shut, the basement is dark, unless certain gas jets are lit, and is then dark beyond the area reached by those lights.

The basement can be reached, first from the rear door leading to the alley; second, from the stairway leading through a trap door to the hall or store room on the ground floor; third, by the freight chute leading from the rear of this store room, on the ground floor; fourth, by another small chute or opening leading from about the middle of this store room on the ground floor, to an enclosure in the basement; fifth, by the ladder ascending through the trap door in the front area of the building which opens on the front of Forsyth Street, and which is near the flight of steps leading up to the second floor; sixth, from the elevator shaft which is in this same open area in the front of the building. (See Def. Exhibits 61, 68, 69, 70, 71, 73, in Brief of Evidence, pages 300, 301 and 302.)

There is also in the basement a planked-up or enclosed space on the south side, which was formerly used by a tenant occupying the store space on the ground floor,—this planked-up space being reached by a door.

The National Pencil Company made no use of the ground floor and did not rent that space. Prior to January 1st, 1913, that space on the ground floor had been

occupied by the Clarke Woodenware Company, who used the same general entrance on Forsyth Street, which the Pencil Company used.

On the second floor of the building, on the East, and looking out on Forsyth Street was the office of the defendant, Frank, who was the Superintendent of the factory. The balance of the second floor was used for various purposes, and in the back or west end of the second floor was what is called a metal room, which was filled with machines, and in which a number of operatives worked—the metal room being reached by double doors which had no lock or fastening from the inside—these double doors having glass windows through which a view could be had of the inside of the metal room, and these doors to the metal room being directly in front of the top landing of the first stairway. (See Def. Exhibits 67, 74, 82, 83, 84, Brief of Evidence, pages 301, 302 and 303). The third and fourth floors were devoted also to manufacturing purposes and on all of these floors worked a number of employees, to-wit: over 100 in number,—most of them being women and girls.

Frank worked in an inner office, on the North side of the building and next to his inner office was an outer office which contained a safe and which opened into the space facing the stairway. (See Def. Exhibits 65, 66, 68, Brief of Evidence, pages 301 and 302.)

DISCOVERY OF BODY.

On the morning of April 27th, 1913, Newt Lee, the negro night watchman at the factory, went into the basement to the colored toilet towards the rear "to ease his bowels" (as he testified) and when he was emerging from the toilet and buttoning up his clothes, he discovered an object lying at the rear of the planked-up partition and

towards the dust bin, and upon going there discovered the dead body of a young girl, which turned out to be that of Mary Phagan, who was an employee of the metal room of the Pencil works, and had been laying off from work since Monday of the preceding week for lack of material.

Lee's lantern was dirty, and after discovering what looked to be a woman's leg and dress, he picked up his lantern and went towards the object. He had been in the basement before on this same night, as it was his duty to visit the basement every hour during the night, but had never gone back this far (we are giving now the substance of Lee's testimony). Thinking at first that mischievous persons had tried to scare him by placing something in the basement that looked like a body, he walked a few steps toward it and upon discovering it to be a dead body, went to notify the police.

The body was lying on its back, said Lee, with the face turned "kinder" to one side, and he could see her forehead.

Lee reported to the Police over the telephone that he had found the body of a white woman.

ARRIVAL OF POLICEMEN AT MURDER SCENE.

A number of Policemen arrived about ten minutes after receiving Lee's telephone message, and went on into the basement with Lee and examined the body. The policemen testified that the girl was lying on her face instead of her back, as Lee had stated, with her left side on the ground. The police could not tell at first whether she was white or black until the body was turned over, the dirt rubbed off her face and her stocking pulled down, when it was discovered she was a white girl.

CLUES FOUND BY POLICE AT MURDER SCENE.

A further investigation disclosed a cord tied tightly around her neck, sunk into the flesh, causing the tongue to protrude a little; also a piece of her underskirt had been torn off and was loosely wrapped around her neck. There was a cut on the left side of her head, extending to the skull, and some blood. The face was considerably punctured, full of holes and was swollen. The blood on her head was dry, but upon Sergeant Dobbs putting his finger under her hair, it was found a little moist.

Sergeant Dobbs further testified that he found lying near the head and under the sawdust, two notes and a dirty scratch pad lying near them. They were written in a very poor hand and are scarcely legible, as the photographic copies in the record show. (See State's Exhibits Y and Z, Brief of Evidence, pages 252-A and 252-B).

According to the best we can make of it, one of the notes was intended to read as follows—the explanations in parenthesis being interpolated by counsel to make the meaning clear:

"Mam, that negro fire (meaning "fireman") down here did this i went to make water and he push me down a hole. a long, tall negro black that (did) had it, (then follows a word which looks like "wake" but which makes no sense in any conceivable view and which was probably intended to begin some other sentence, but the writer, after making this word "wake", changed his mind and wrote something else, neglecting to erase the word "wake") long, slim, tall negro. i write while play with me." (See State's Exhibit Z, Brief of Evidence, page 252-B).

The other note, as best we make it out, reads as follows:

"He said he would love me laid down, play like the night witch did it but that long, tall, black negro did boy hisself." See State's Exhibit Y, Brief of Evidence, page 252-A).

Further back, between the body and the elevator, the policemen found the girl's hat and one of her shoes on a trash pile near the boiler. The ribbons had been taken off of the hat. Policeman Dobbs thought the body looked as if the girl had been dragged by her feet on her face, and some of the policemen found marks that seemed to indicate that the body had been dragged from the bottom of the elevator shaft to the place where it was found. Sergeant Dobbs didn't think Newt Lee could have seen the face with his lantern from where he claimed to have seen it.

Dobbs, when he found the notes, began to try to read them in the presence of the watchman Lee, and when he got to the words "a tall black negro did this; he will try to lay it on the night"—he was interrupted by the negro Lee who says: "That means the night watchman,"—Lee being the night watchman. (See Brief of Evidence, page 9).

The body was found about 150 feet from the ladder leading down to the trap door which was near the elevator shaft. The girl's purse or mesh bag and ribbon from her hat were never found. The girl's handkerchief was found about 10 feet west of her body, towards the rear door, on the sawdust pile.

The back door in the basement, which led into the alley and which was only a few feet beyond the body, was examined by the policemen, and it appeared that the staple through which a bar passed that kept the door closed

had been prized out and the door thus opened. (See Brief of Evidence, pages 9 and 178.)

Detective Starnes found cords like the one around the girl's neck all over the factory, including the basement, (See Brief of Evidence, page 11) and the witness showed that these cords came around bundles of wood which were made into pencils and many of them were scattered over the factory.

There was no blood on the ground where the body was found. (Brief of Evidence, page 9).

As to other clues found in the basement, on the left side of the body, Policeman Anderson saw a number of tracks which led from the body to the shavings room. (See Evidence, p. 40).

We desire to call the Court's especial attention to the following significant fact: when the Police first went into the basement, they did not use the elevator, but went down through the scuttle hole, and they found there in the elevator shaft some fresh human excrement. Afterwards they used the elevator in going down, and they noticed that the elevator came in contact with the excrement and mashed it flat. (See Rogers, p. 15, Lassiter, p. 43). The significance of this will be dilated upon hereinafter.

SIGNS OF VIOLENCE UPON CORPSE.

The body of the girl was found rigid, Gheesling, the undertaker, who moved the body about four o'clock, testifying that she had been dead from ten to fifteen hours or longer. The right leg of the girl's drawers were either slit with a knife or torn open to the seam and there were some dry blood splotches and urine on her underclothes. There was no mutilation of the body. (See Brief of Evidence, p. 45).

The sum total of the wounds on the girl's body and the cause of her death were described by state's witness, Dr. Hurt, Fulton county's official physician, as being a scalp wound about 2½ inches long, behind the ear, on the left side of the head; a black, contused eye; a number of small scratches on the face; the protrusion of the tongue about half an inch through the teeth; a wound on the left knee and some superficial scratches on the left and right elbow. The cord around her neck was tight, and in the physician's opinion she died from strangulation. Dr. Hurt also examined the privates of the girl and found that the hymen was not intact and found blood on the drawers but found no violence to the vagina. He found blood on her privates. His testimony as to this is as follows: "There was blood on the parts. I do not know whether it was fresh blood or menstrual blood. The vagina was a little larger than normal size of a girl of that age." (See Brief of Evidence, pp. 46 and 47). The blow on the head did not fracture the skull, nor did it affect the brain. Dr. Hurt saw no indication of an injury to the hymen; and the appearance of blood on the privates was characteristic of a menstrual flow; and there was no laceration of the vagina and no mutilation of the girl's body except the wounds on the face, head and legs; and the size of the vagina in this case was no indication of anything except the anatomy or natural build of the person and was no indication of rape; and Dr. Hurt found no signs of rape and no external marks of violence (see Brief of Evidence, pp. 46 and 47).

The girl would have been 14 years of age in less than three months (see Mrs. Coleman, Brief of Evidence, page 1.)

MOVEMENTS OF DECEASED ON DAY OF TRAGEDY.

We will now take up the whereabouts of Mary Phagan on the day of the tragedy as disclosed by all the evidence, both of the state and the defendant:

At 11:30 o'clock on the morning of April 26th, 1913, the deceased ate a dinner of cabbage and bread, and at about a quarter of twelve left her home, which was in Bellwood, a suburb of Atlanta, to catch the street car and come to Atlanta (See Brief of Evidence, page 1.)

According to Matthews, the motorman of the car which brought her into the city,—and he remembered distinctly carrying her—the girl boarded his car at Lindsay Street in Bellwood, at 11:50 o'clock. The car arrived at Broad Street at 12:07½. The girl stayed on the car until it reached the corner of Hunter and Broad, which was between 12:10 and 12:10½, and the girl there left the car (see Brief of Evidence, pages 83 and 84).

Hollis, the conductor of the street car, also remembered bringing the little girl into town and he said she boarded his car at Lindsay Street at 11:50 o'clock. Hollis left his car at the intersection of Forsyth and Marietta Streets at 12:07½,leaving the deceased still on the car at that time. (See Brief of Evidence, pp. 84 and 85).

The state put up a boy named George Epps who claimed to have ridden in on the car with the deceased, Epps testifying that he saw the girl on the car at about 11:50, and left the car with her at 12:07, at the corner of Forsyth and Marietta Streets and that the girl was going to the Pencil factory then to draw her money, and walked on down Forsyth Street towards the Pencil factory.

Neither the conductor nor the motorman remembered Epps being on the car; but we will discuss the case as if Epps were telling the truth.

TIME OF ARRIVAL AT FACTORY BY DECEASED.

The state's witness, Starnes, swore that it took three minutes to walk from Marietta Street at the corner of Forsyth, down to the Pencil factory (Brief of Evidence, page 10).

Thomas, a civil engineer, measured the distance from Marietta and Forsyth Streets, to the Pencil factory, and it was 1,016 feet, and upon walking the distance, found it required 4½ minutes. The distance from the corner of Broad and Hunter Streets to the Pencil factory was 333 feet, and to walk it required a minute and three-quarters. From the Pencil factory to the intersection of Whitehall and Alabama streets—the materiality of which will appear later, is 831 feet, and to walk it required 3½ minutes (Brief of Evidence, page 153). Of course, the time of walking these distances depends upon the amount of travel on the streets at the time, and it will be remembered that the 26th of April was Memorial Day and the city very crowded.

It will thus be seen that Mary Phagan could not have reached the factory earlier than 12:11 o'clock, if the testimony of Epps, the State's witness who rode in with her, and of the conductor and motorman who carried her, are to be given credence.

We leave out of view, in discussing the time of arrival of Mary Phagan at the Pencil factory, the evidence of two uncertain witnesses (whom the State put up in rebuttal to refute the testimony of their own witness Epps) who made no definite statement as to time and who claimed (as we say, under discrediting and suspicious circumstances) to have seen Mary Phagan in her walk from Forsyth Street down to the Pencil factory. One of these

witnesses was a man named Kendley, who simply testified that while he was on a street car between Forsyth and Alabama, he saw "Mary Phagan about noon"; he testified on cross examination that the Hapeville car he was on was due in Atlanta at 12 o'clock that day; that he didn't know whether it was on time; that if Mary Phagan left her home in Bellwood at 10 minutes to 12, she could have gotten to the city about 10 minutes after 12, and could not have gotten in much earlier than that; that the time he claims to have seen her is simply an estimate; that he only remembers seeing her by reading of the tragedy the next day; that he never testified before the Coroner. (See Brief of Evidence, page 230.) This witness was shown by the testimony of Brent, Stahl, Miss Haas and Asher to have been very bitter in his expressions towards Frank; that he was a street car conductor and had said in the presence of some of these witnesses that he felt about Frank as he did about a couple of negroes hung in Decatur; that he didn't know whether they had been guilty or not, but somebody had to be killed for the murder of the street car man; that it was just as good to hang one negro as another; that Frank was nothing but an old Jew and they ought to take him out and hang him anyhow; that he had said on another occasion that Frank was as guilty as a snake and ought to be hung, and if the court didn't convict him, he would be one of five or seven to get him. (See Brent, page 241, Miss Haas, page 242, Stahl, page 241, Asher, page 242.) Surely the testimony of this man Kendley, who does not pretend to be accurate as to time (and who claims that if the girl did come in on the car which she did come in on, she could not have gotten to the corner of Forsyth and Alabama Streets earlier than 12:10) can carry absolutely no weight.

The other witness who claims to have seen Mary Phagan was one McCoy, who said that on April 26th he saw her in front of Cooledge's place on Forsyth Street, which is between Marietta Street (where the car stopped) and the Pencil factory, and that she was going toward the Pencil factory. All that this witness could say was that "it was near 12 o'clock." Witness testified that he had left the corner of Walton and Forsyth Streets at 12 o'clock and come straight on down there, taking three or four minutes. He said he knew it was 12 o'clock when he left Walton and Forsyth Streets because he looked at his watch. He said he didn't consider seeing the girl a matter of any importance until he noticed a day after the tragedy the statement of the motorman of the car that she came in on. (See Brief of Evidence, page 229). As to this witness McCoy, it is shown by Sinkovitz, a pawn broker, that on this very date he had McCoy's watch in pawn and that McCoy never paid up his loan and took his watch until the August following; and this was the same watch that he had been lending McCoy money on, off and on for two years. (Brief of Evidence, page 242).

Even without the impeachment of McCoy—he only approximated the time and said it was somewhere about noon,—five or seven or ten minutes after twelve would be considered "about noon."

Surely vague and indefinite evidence as this, is of no probative value against the testimony of men operating a car schedule, as well as the testimony of the State's own witness Epps—a passenger on the car—who rode in with the deceased. It must be remembered also that McCoy and Kendley were put up by the State in rebuttal only after it was realized that Epps' testimony would prove fatal to State's theory of the crime.

EVIDENCE AS TO LAST TIME GIRL WAS SEEN.

The mystery in this case dates from the time the deceased entered the Pencil factory, got her pay and left the office of the defendant.

The defendant, when the news of the tragedy was brought to him, remembered that somewhere between ten and fifteen minutes past twelve on Saturday, a little girl had called at his office, (he did not know her name) had gotten her pay for the short time she had worked the preceding week, and had left. (See Statement of Defendant, Brief of Evidence, pages 202, 203, also Rogers, page 13, Black, page 19.)

DEFENDANT'S MOVEMENTS ON APRIL 26th.

We will now take up all that the evidence discloses with reference to the defendant's whereabouts on the day of this tragedy and all that the evidence shows happened at the Pencil factory; and we are first presenting all the facts which have been shown, either by the State or the Defendant, outside of the testimony of the State's main and only witness as to anything incriminating against the defendant—Conley. Conley's evidence will be dealt with later. We will first present the facts, therefore, with Conley left out of the transaction, and will later take up Conley's evidence.

On April 26th, Frank, who as has been stated, was Superintendent of the Pencil factory, arrived at the factory at about 8:30 o'clock in the morning. Saturday was a holiday at the factory—it being Memorial Day; but Frank and the office force, the watchman and others, were doing certain special work.

Frank had a vast amount of work to do on this day and was seen doing his work about the factory by Hol-

loway, the day watchman (See Evidence, page 30), Alonzo Mann, the office boy (See page 122), McCrary (page 130), Quinn (page 106), Darley (page 35), Wade Campbell (page 105), and Miss Hall (page 101). At 8:30 Frank reached the factory (See Holloway, page 30). About 9.40, Frank left the factory for Montag Brothers to get his mail and papers, with Darley (see Darley, page 35, Sig Montag, page 128, J. C. Matthews, page 122, Harry Gottheimer, page 124, Nix, page 123). While at Montags he requests Miss Hattie Hall, the stenographer of Pencil Company, to come to factory to take dictation. (See Miss Hall, p 100). He also asked his friend Gottheimer to come over to factory that afternoon. (See Miss Hall, p. 103, Gottheimer, p. 124).

About 11 o'clock Frank returns to the factory with the papers (See Holloway, page 30; Alonzo Mann, page 122; Miss Hattie Hall, page 101; Mrs. Arthur White, page 21). Upon his return to the factory, Frank realizing the amount of work he had on hand, asked Alonzo Mann the office boy, to telephone Mr. Schiff, his assistant, to find out when he was coming down. (See Defendant's Statement, page 181; Alonzo Mann, page 122; Emma Beard, page 121). Mr. Schiff not coming down, Frank had the office boy telephone him again. (See Emma Beard, page 121).

He works with his papers and his dictation until after 12 o'clock, as shown by numerous witnesses, including Miss Hall.

At 11:35 o'clock, Emma Freeman and Corinthia Hall, two women who worked in the factory, came in and saw Frank and asked permission to go upstairs and get Mrs. Freeman's coat, which was granted. (See Evidence, pages 103 and 104).

Frank had previously allowed Mrs. Arthur White, at about 11:30 o'clock, to go upstairs and see her husband—there being two men, White and Denham at work during all the morning on the fourth floor (See Mrs. White, page 21). After Mrs. Freeman and Miss Hall left, two men, Tillander and Graham, came in to see about some trouble their boys were in and to get their pay envelopes. (See Evidence, pages 232 and 233). At about 11:35 o'clock, Mrs. Freeman and Miss Hall came down from the fourth floor and asked permission of Frank to use the 'phone in Frank's inner office, which they did. (Evidence, pages 103 and 104). All this time Frank was dictating to Miss Hall and working on his papers, while White and Denham were working all this time on fourth floor. Mrs. Freeman and Miss Hall left the office about 15 minutes to twelve. (Evidence, pages 103 and 104).

There are two Misses Hall who figure in the case, one Miss Corinthia Hall, who came in and asked permission to go to the fourth floor and afterwards to use the telephone; and the other, Miss Hattie Hall the stenographer. About 12 o'clock Miss Hattie Hall finished her work of taking dictation from Mr. Frank, and as the whistles blew started to leave. She started down the stairs and came back, having forgotten her umbrella, and noticed that it was 12:02 o'clock. (See Miss Hall's evidence, page 101). Frank in his statement says he was in his office after Miss Hall left, except such time as he may have gone to the toilet to attend to some call of nature, which is a thing, he says, he could not remember if it had occurred. (See Defendant's statement, page 185).

At 12:05 o'clock a little girl named Monteen Stover, State's witness, entered the building to ask for her pay —the time being impressed on her mind by the fact that

she tried to get there by 12 o'clock, but was a little late. She states that she did not see Frank in his office and sat down in the hall near the clock and waited five minutes, leaving at 12:10—there being nobody present in the building, so far as she knows, the factory being still and quiet while she was there. (See Monteen Stover, page 26.) The testimony shows that in the outer office is a safe and the door was open and it swung in front of the door to Frank's inner office and prevented any person of small stature (and Monteen Stover was a small girl) from seeing into the inner office. (See evidence of Schiff, page 91; Adams, page 150; Darley, page 38; Kaufman, page 149; and photographs and drawings, set forth as Def. Ex. 65, 66 on page 301).

Frank in his statement says that between 10 and 15 minutes after Miss Hall left (which would make it between 12:12 and 12:17) the little girl, Mary Phagan, entered his office and asked for her pay. Frank asked her for her number and got it and took her envelope out of the cash box and gave it to her. The girl left his office and when she had gotten to the outer door of the outer office, she stopped and asked him if the metal had arrived (the delay in the arrival of the metal was holding her off from work) and Frank told her that it had not. Frank stated that she then continued on her way out and he had an impression of hearing a female voice say something as her foot steps died away, but wasn't sure. This was the last he saw of her. (Evidence, page 186).

At this time it is undisputed that Arthur White, Harry Denham and Mrs. White were all on the top floor of the building and that there were open stairways and open steps leading from the top floor down to this second floor where the little girl entered and left, and any of those parties were apt to come down at any minute. (See

Evidence of Mrs. White, page 21; and Denham, page 108; Defendant's Statement, page 185).

Between 12:20 and 12:22 Lemmie Quinn, the foreman of the metal room, under whom deceased worked, came into Frank's office and had a short talk with him, Frank being at work when he came in. (See Evidence of Quinn, page 107).

Frank's statement (on page 186 of the Brief of the evidence) as to the possibility of his having left his office for a short while as explanatory of the Stover girl's evidence, is as follows: "Now, gentlemen, to the best of my recollection, from the time the whistle blew for twelve o'clock until a quarter to one, when I went up stairs and spoke to Arthur White and Harry Denham,—to my best recollection, I did not stir from the outer office; but it is possible that in order to answer a call of nature, I may have gone to the toilet. Those are things that a man does unconsciously and does not know how many times or when he does it."

At 12:35 o'clock, Mrs. Arthur White going back up to the fourth floor, passed by Frank's office and saw him standing in the outer office in front of the safe. (See Mrs. White, page 21). At ten minutes to one, Frank leaves the office and goes up to the fourth floor where White and Denham are working. Mrs. White also being there, and asks White and Denham if they are through with their work. They reply that they had enough work to keep them several hours. Frank then asked Mrs. White if she was going or wanted to stay, as he was going out to lunch and would have to lock up the factory. Mrs. White said she would go and Frank then went down the stairs. (Denham, page 108, and Mrs. White, page 21).

Frank then left the office and went up Forsyth to Alabama and down Alabama to Whitehall, to catch the Georgia Avenue car at the corner of Alabama and Whitehall, for his home on East Georgia Avenue. (Defendant's Statement, page 186). While Frank was standing at the corner of Whitehall and Alabama Streets, waiting for his car at about 1:10 or 1:11, he was seen by Miss Kern, who testified positively and emphatically that she saw him at that time, at that place. (Miss Kern, page 113).

Frank's car arrived at Georgia Avenue, at the intersection of Washington and Georgia Avenue, at about 1:20 and he got off and went to his home, which was only a few doors from Washington Street. He was seen to leave the car at that time by Mrs. Levy, who was looking out for her son on that car. (Mrs. Levy, page 114). When he arrived at his home at 1:20 he was seen by his father-in-law, Mr. Selig, his mother-in-law, Mrs. Selig, and the cook, Minola McKnight. (Mrs. Selig, page 112; Mr. Selig, page 110; Minola McKnight, page 109).

The State's witness, Albert McKnight, claims he saw Mr. Frank in the house at 1:30 (McKnight, page 41). All the witnesses just named, to-wit: Minola McKnight, Mr. and Mrs. Selig, show that Frank ate his dinner in the usual way, his wife and mother-in-law leaving the house before he did, to go to the Grand Opera Matinee. (See Mrs. Selig, page 112).

Before eating his dinner, Frank called up Mr. Ursenbach on the telephone to tell him that on account of some work he had to do at the factory, he would be unable to go with Mr. Ursenbach to the baseball game as previously arranged. (See Defendant's Statement, page 187; Annie Hixon, page 122; Ursenbach, page 125).

Between ten minutes to two and two o'clock, Frank left his home, went up Georgia Avenue to Washington

Street to catch the car, and while waiting for it, saw Mrs. Michael, Mrs. Wolfsheimer, Mr. Michael and Mr. Loeb, and all these parties saw him catch the car at 2 o'clock, at the intersection of Glenn and Washington Streets. (See Evidence, pages 114, 115, 116 as to each of these parties). He rode to the city in the car with Mr. Loeb. (Loeb, page 116). There was a parade on Hunter Street which stopped the car, and Frank left the car and walked on down Hunter Street to Whitehall. He was also seen on the car by Mr. Hinchey. (Evidence, page 116). He was seen on Whitehall Street by Miss Rebecca Carson at about 2:20 o'clock. (See Miss Carson, page 117). He got to the factory between half past two and three. (See statement of Frank, page 187; also Denham, page 108).

While at the factory that afternoon Frank got up a complicated document called the financial sheet (see Brief of Evidence, pages 187 to 200). The preparation of this sheet is shown by expert accountants, who went over every item of it and testified that it was correctly prepared, to have occupied at least from 3½ to 4 hours. (See Joel Hunter, page 98; C. B. Pollard, page 99; Schiff, page 86; Darley, page 33). This financial sheet was lying completed on Frank's desk next Sunday morning when Darley arrived at the factory (see Darley, page 33). A summary of this financial sheet was mailed that same afternoon by Frank to his uncle and a copy also to Oscar Pappenheimer. (See Defs. Ex. 45, page 297, and testimony of Oscar Pappenheimer on page 125). The two expert accountants showed that the work was done carefully and accurately and that only in one item was there a discrepancy of a few cents, and that was made by not carrying out certain decimals, and that any good book keeper would have considered it good calculation

(see Hunter, page 98; Pollard, page 99; Schiff, page 86). As a matter of fact, this error was Schiff's and not Frank's. (See Pollard, page 99).

During this same afternoon Frank also wrote and mailed a letter to his uncle M. Frank in New York City (see evidence, page 201, and Defendant's Exhibit 42, page 294.) During the afternoon and a few minutes after Frank took up the financial sheet, Arthur White and Harry Denham came down from the fourth floor and White borrowed $2.00 from Frank and Frank put a ticket in the cash drawer to show the amount. (See Statement of Frank, page 187; Denham, page 108; Schiff, page 100).

Shortly after 4 o'clock the watchman, Newt Lee, came in, inasmuch as Frank had told him the day before to come back at 4 o'clock, as Frank had expected to go to the ball game. When Newt Lee reported at 4 o'clock, Frank told him he had changed his mind about going to the ball game, and that he could go out in town, but be sure and return by 6:30 o'clock. (See Frank's Statement, page 188; Lee, page 2).

Frank did not go to the ball game because Schiff who was to have compiled certain data for the financial sheet the previous day had failed to do so. (See Schiff, page 87). Frank had tried to get him on the telephone Saturday morning, but was unable to do so. (See Emma Beard, page 121; Frank's Statement, page 181). The day also was a bad one and Frank had called up Mr. Ursenbach, with whom he had the engagement to see the game, and said he could not go. (See Ursenbach, page 125; Annie Hixon, page 122; Frank's Statement, page 187).

Newt Lee had been at the place only three weeks. (See Lee, page 2).

The intricate and complicated nature of the financial sheet, and the data necessary to be compiled for its preparation is most convincingly shown by the defendant's statement (see pages 187 to 202), as also by the testimony of the two expert accountants, Joel Hunter, (page 98) and C. B. Pollard (page 99), and by the testimony of Schiff (page 88) and Darley (page 33). The testimony of these witnesses shows that the calculations were made correctly and that there is not a tremor in Frank's handwriting. After Frank finished the work on the financial sheet he wrote the letters we have heretofore referred to. In addition to this, he had to check up and balance the cash (see page 198). According to Frank and Schiff, this took about 25 minutes additional (See Schiff, page 90). Frank finished this work at about five minutes to six, then proceeded to take out the clock slips for that day and replace them with new ones for the next day. (See page 200).

After finishing his work about six o'clock, Frank starts to leave the factory, goes downstairs, and finds Newt Lee at the entrance talking to a discharged employee, named Gantt. (See Frank, page 200; Lee, page 3; Gantt, page 20). Gantt had previously been discharged for shortage in the nature of stealing. (See Defendant's Statement, page 200; Gantt, page 20).

Lee's instructions were to allow no one in the factory and he had refused Gantt admission. (See Lee, page 3; Frank, page 200). Frank asked Gantt what he wanted; Gantt said he had some shoes in the factory he wanted to get. Frank told Lee it would be all right to let Gantt in, and told Lee to go with him and be with him when he got the shoes. (See Frank, page 200; Gantt, page 20; Lee, page 3).

Frank arrived home about 6:25, P. M. (See Selig,

page 111; Mrs. Selig, page 112; Minola McKnight, page 109). After Frank got home he called up Lee on the telephone at 6:30, but couldn't get him. At seven o'clock he did get Newt Lee, and asked Lee if Gant had gone and Lee said "yes." (See Frank, page 201; Lee, page 3). That night Frank ate his supper as usual, sat around the house and read the paper while the others played cards. (See the testimony of the several witnesses on pages 126, 127 and 128). These witnesses testified that at about 10 o'clock, or a little after, Frank left the hall where he was reading, and went upstairs to bed.

FRANK'S ALIBI CHART.

A chart of Frank's whereabouts on the 26th day of April, with the exact hour and the names of the persons who came in contact with him, and all who testified, is as follows:

7:30 A. M. Minola McKnight sees him at breakfast. (See Brief of Evidence, page 109).

8:25 A. M. Frank arrives at the factory and is seen by Holloway, (see page 30), Alonzo Mann and Irby. (See pages 122 and 177).

9:30 A. M. Holloway sees Darley and Frank leave building to go to Montag's. (See pages 30, 35 and 179).

10:00 A. M. Frank arrives at Montag's and is seen by Sig Montag (see pages 128 and 180), Harry Gottheimer (see page 124), Miss Hall (see page 100), Mr. Matthews (see page 122), and Mr. Nix (see page 123).

At 11 and 11:30 A. M. Alonzo Mann phones Schiff's house to get Schiff to come to the office and help Frank work. (See pages 122 and 181).

11:00 A. M. Frank returns to factory and is seen by Holloway, Mann, and Miss Hall. (See pages 101 and 180).
From 11 A. M. to 12 noon Frank is working on papers and dictating in office to Miss Hall, his stenographer. (See pages 101 and 181).

11:30 A. M. Mrs. White sees Frank and asks permission to go upstairs and see her husband. (See pages 21 and 181).

11:35 A. M. Corinthia Hall and Emma Freeman, Graham and Tillander come into the building and talk with Frank, as does Mrs. May Barrett. (See pages 104, 181, 220, 232, 233).

11:45 A. M. Corinthia Hall and Emma Freeman go into Frank's inner office and use the 'phone, by his permission, and leave the building. (See pages 103, 104, 181 and 220).

11:50 A. M. Mrs. White leaves building and sees Frank in his office. (See pages 21 and 181). Hattie Hall leaves building, seeing Frank at work when she left. (See pages 101 and 185).

12:05 P. M. to 12:10 P. M. Monteen Stover claims to have come to the building and failed to see Frank. (See page 26).

12:12 P. M. Mary Phagan enters office according to Frank's statement (see page 185), and a minute or two thereafter leaves, and this is the correct time of her arrival, accord-

ing to the evidence of her mother, the street car motorman and conductor, George Epps and the schedules of the street cars, and as shown heretofore there is substantially no dispute about it. (See Mrs. Coleman, page 1; Matthews, page 83; Hollis, page 84; Epps, page 1).

12:20 P. M. to 12:22 P. M. Lemmie Quinn sees and talks with Frank. (See pages 107 and 186).

12:30 P. M. Mrs. White comes by the office and again sees and talks with Frank. (See pages 21 and 186).

12:50 P. M. Frank goes to fourth floor and sees Denham and White and Mrs. White. (See pages 108 and 186).
About 1 P. M. Frank leaves the factory for his home. (See page 186).

1:10 P. M. to 1:11 P. M. Frank is seen by Miss Kern, at Jacobs' Pharmacy, at the corner of Whitehall and Alabama Streets. (See page 113).

1:20 P. M. Mrs. Levy sees Frank get off the Georgia Avenue car and enter home. (See page 114).

1:20 P. M. Minola McKnight, Mrs. Selig and Mr. Selig see Frank arrive at his home on Georgia Avenue. (See pages 109, 110 and 112).

1:30 P. M. Frank calls up Ursenbach to break off previous baseball engagement. (See pages 122 and 187).

1:30 P. M. State's witness, Albert McKnight, claims to see Frank at Frank's home on Georgia Avenue. (See page 41).

1:55 P. M. to 2:00 P. M. Frank is seen by Mrs. Michael, Julian Loeb, Jerome Michael and Mrs. Wolfsheimer at Wolfsheimer's home on Washington Street, in the same block with Frank's residence. (See pages 114, 115, 116 and 187).

2:00 P. M. Cohen Loeb boards Washington Street car with Frank at Glenn Street, in the same block as Frank's residence. (See pages 116 and 187).

2:10 P. M. Hinchey in his automobile sees Frank on the car in front of State Capitol, corner Washington and Hunter Streets. (See page 116).

2:20 P. M. Miss Rebecca Carson sees Frank on Whitehall Street in front of M. Rich & Bros. Co. (See pages 117 and 187).

2:50 P. M. Miss Rebecca Carson sees Frank going into Jacobs' store at the corner of Whitehall and Alabama Streets. (See pages 117 and 187).

3:00 P. M. Frank arrives at Pencil factory and goes to fourth floor and sees White and Denham. (See page 187).

3:08 P. M. White and Denham on leaving the building go by Frank's office, see him, and White borrows $2.00 for which Frank puts a ticket in cash drawer. (See pages 108 and 187).

3:10 P. M. Frank begins work on financial sheet. (See page 187).

3:45 P. M. Newt Lee arrives and converses with Frank. (See page 188).

6:00 P. M. Frank completes work. (See page 200).

6:05 P. M. Frank, on leaving building, meets Newt Lee and Gantt. (See pages 3, 20 and 200).

6:10 P. M. Mrs. Selig sees Frank at Jacobs' Drug Store at corner of Whitehall and Alabama Streets. (See page 112).

6:25 P. M. Emil Selig sees Frank at the Selig home on Georgia Avenue. (See pages 111 and 201).

6:30 P. M. Mrs. Selig, Minola McKnight and Mr. Selig see Frank at Selig home. (See pages 109, 111, 112 and 201).

7:00 P. M. Frank phones Newt Lee. (See pages 3 and 201).

8:00 P. M. to 8:30 P. M. Frank seen at Selig home by Goldstein, Mrs. M. Marcus and Mrs. Sarah Marcus. (See pages 127, 128 and 201).

10:25 P. M. Frank seen at Selig home by I. Strauss. (See pages 128, 201).

10:30 P. M. Frank retires to bed, and is seen going up the steps by the parties just mentioned. (See page 201).

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FRANK A COLLEGE GRADUATE AND CHARITY WORKER.

Frank is a highly educated man, being a graduate of Pratt Institute and Cornell University, and a man of exemplary character. Professors Albert and VanDerhoef, members of the Cornell Faculty, came down just to testify to his good conduct while a student at that institution. (See page 168). Several of his classmates at Cornell came all the way from their respective homes in different parts of the country to give testimony as to his good character and standing while at college. (See pages 167 and 168). He is President of the local B'nai B'rith Lodge, this association being a Jewish benevolent organization of large membership, (see Copelan, page 137; Montag, page 129), and is also a member of the Board of Trustees of the Hebrew Orphans Home of this city. (See Kriegshaber, page 169).

CIRCUMSTANCES RELIED ON BY STATE.

We come now to the alleged suspicious circumstances, as against Frank, which the State relies on for conviction, and in this connection it is but proper to say that every minute circumstance has been seized upon, exaggerated and distorted in a manner which we believe to be without precedent in the annals of criminal prosecutions. This statement is fully substantiated, we submit, by the following outline of the State's case against Frank:

FRANK LAST PERSON TO SEE DECEASED ALIVE.

It is claimed that Frank was the last person to see Mary Phagan in life so far as the direct testimony at the trial shows. In this connection the evidence shows that

Frank, without reserve, volunteered to the officers the information that he had seen the little girl on April 26, between 12:12 and 12:17, and but for this open and unreserved statement, voluntarily given to the officers by Frank, it would never have been known that he had seen Mary Phagan in life. (See Rogers, page 13; Black, page 19). This certainly is not the action of a guilty man, and we submit that the record shows that Frank, throughout the entire investigation of this terrible crime, has been open and above board in all his dealings with the detectives and police officers and gave them all possible assistance in the matter. (See Black, page 18; Rogers, pages 12 and 14; Scott, page 22).

FRANK EXCUSES LEE FROM 4 O'CLOCK TO 6:30 ON SATURDAY.

The testimony shows that Frank on Friday, the day previous, had told Newt Lee that he was going to the baseball game and for Lee to return at four o'clock, and it is claimed that when Lee returned at four o'clock on Saturday and Frank excused him until 6:30, that this was a suspicious circumstance as against Frank.

We have heretofore shown that Frank had excellent reasons for not going to the baseball game on Saturday, namely, the great amount of work on hand owing to Schiff's failure to complete certain data necessary for the compilation of the financial sheet, (see Brief of Evidence, pages 122, 127 and 187) and inasmuch as he knew his work required him to be in the office until six o'clock, there was every reason why he should have excused Newt Lee, but outside of this—the State's theory of the crime was that the murder was committed and the body disposed of by 1:30 o'clock on Saturday; certainly if this be true, there could be no motive or reason on Frank's part

at four o'clock in the afternoon for sending Lee away from the factory. There was nothing to be gained by so doing, because nothing more was to be done to the body at that time according to the State's theory. The body was in its last resting place for the day by 1:30, and inasmuch as Frank knew that Lee, being the night watchman, would be at the factory all that night by himself, and inasmuch as the basement was as dark in the daytime as at night, there could be no design whatsoever on Frank's part in allowing Lee to be out of the factory the two hours between four and six. We submit, therefore, that this contention of the State is wholly without point. No incriminating motive for this action is suggested by the State, and in the absence of such, none will be presumed against him.

FRANK NERVOUS ON MEETING GANTT.

It was claimed that Frank started or looked uneasy when he met Gantt at six o'clock that evening on leaving the factory. It will be borne in mind that Gantt had been discharged for stealing and that his coming to the factory at that unusual hour and on a holiday was a thing calculated to excite a man, especially one of Frank's temperament. The record shows that Frank was excitable in the presence of tragedy, conflict, or friction of any character whatsoever; that when a street car on which he was riding once ran over a young child, he was so nervous that he could not work the balance of the day, (see Darley, page 37; Schiff, page 91), that when he had a slight controversy with one of the Montags on one occasion, it made him so nervous that he could not perform his duties for the day. (See Darley, page 36). It was, therefore, altogether a reasonable supposition on Frank's part that Gantt a discharged employee, and who was a

big man physically, was coming there to give some kind of trouble, perhaps for a fight. (See Lee, page 5).

FRANK TELEPHONES LEE WHEN HE REACHES HOME.

It is also regarded as suspicious by the State that Frank should have telephoned Lee at 6:30 and again at 7 o'clock Saturday night on reaching home. It will be observed in this connection that Newt Lee had only worked three weeks in the place and was the first negro night watchman that the National Pencil Company had ever employed. (See Lee, page 2; Darley, page 75; Holloway, page 77). It will also be borne in mind that this was a holiday and that when Frank left the building, Newt Lee was going into the factory with a man, who had been discharged two weeks previous for stealing, under instructions to stay closely with him. The record also shows that Frank was a careful, prudent man, and what was more natural than for him to want to be assured that everything was all right at the factory. That this was not the **first** time that he had 'phoned at night to the factory is also borne out by the record (see Selig, page 111). So that, Frank's telephoning Newt Lee on the evening in question cannot be distorted into evidence of guilt.

FRANK NERVOUS AFTER LEARNING OF TRAGEDY.

On the morning after the tragedy, when Frank was called down to the factory by news of the tragedy, it was testified by Starnes, Rogers and Darley, and a number of other witnesses, that Frank was very nervous, and this is contended by the State as strongly indicative of guilt. The record shows that Frank was waked at a very

early hour with news of a tragedy at the factory of which he was the head, (see Rogers, page 11; Black, page 17; Starnes, page 10); that the officers declined to inform him what was the nature of the trouble, though Frank asked for this information, (see Black, page 17; Rogers, page 11); that without any breakfast or coffee, to which he was accustomed, he was placed in an open automobile and carried through the cold, biting air to an undertaking establishment, where the body of the girl was lying; that he was taken into a dark room by the officers and a light suddenly turned upon the face of the little girl, showing the wounds and discolorations; that after this he was taken to the factory and was shown the scene of the murder. Frank in his statement on the stand openly admits that he was nervous and agitated, and explains fully why. (See page 205). Some people are unnerved at the mere sight of a corpse and it was exceedingly trying on Frank to be thus suddenly thrust into the presence of this terrible tragedy which had occurred in a factory of which he was the active head. Naturally of a nervous temperament, this was enough to upset him completely and render him more agitated and perturbed than he really was. Other parties at the scene of the crime that morning were also nervous and excited. Darley says that Starnes, Black and Rogers seemed excited that morning and that everybody else looked worried (see page 37) and that he himself was excited and worried from the time they told him of the girl's death until he left the building. (see page 38); that he noticed Mr. Holloway and Mr. Schiff were both shaking (see page 38), and that he noticed Miss Flowers crying and screaming, and that he had to go in and calm her (see page 39); that the whole factory was so wrought up that he could hardly keep anybody at work (page 38). Grice, State's

witness, and an entire stranger, admitted that the murder excited him some that morning. (See p. 44). Indeed, the excitement and worry over the crime was so general on Monday that it was impossible to keep any of the factory employees at work and the factory was closed down for the day. (See Darley, page 39; Schiff, page 92; Holloway, page 80). Mr. Sig Montag, the head of Pencil Company, testified that "he (Frank) was no more nervous than we were about the murder when we saw him that morning. I was very much agitated and trembled. My wife was very nervous and commenced to cry." It is strange that the State should rely so strongly upon Frank's nervousness at the scene of this awful crime, and at the same time should have argued at the trial that Frank's calmness, his remarkable composure and placidity subsequent to the tragedy was also evidence of guilt. We are sailing close to the ridiculous when both the accused's nervousness and his lack of nervousness is placed before the jury as evidence of guilt, and yet this is the position the State has taken in this case.

FRANK'S ALLEGED EARLY EMPLOYMENT OF COUNSEL.

Another circumstance relied on by the State as strongly suspicious, is the fact that Frank early Monday morning, April 28, employed Mr. L. Z. Rosser and Herbert J. Haas as his counsel. It will be remembered that on Sunday, Detective Black, with Rogers, went to Frank's house at an early hour, notified him of the crime, took him to the undertaking shop to see the body, from there to the Pencil factory and at that place they went extensively into the circumstances connected with the tragedy. (See Black, page 17; Rogers, page 11). At seven o'clock on Monday morning, officer Haslett went to Frank's house

"and got him and took him to the station house" and kept him there two or three hours. (See Haslett, page 29). This policeman further testified that Detective Black and himself went out for Frank, took him to the station house, turned him over to Chief Lanford; that they had him in there with half a dozen detectives; that they went out for Frank, but supposed "if Frank resisted, they would have taken him anyhow"; that it was not a question whether he wanted to go or not; that two policemen went out for him because if Frank would not go voluntarily they would take him anyhow. (See Haslett, page 29). Detective Black has also testified to the same effect, and further that when Frank was finally turned out, they alluded to it as "Frank's release." (See Black, page 17). In other words, Frank was to all intents and purposes virtually under arrest and held as a prisoner that very morning.

As we have previously shown, every act or failure to act on Frank's part was twisted and distorted into something suspicious against him, and when we now come to look back upon the unfair methods used by the prosecution, and bearing in mind the palpable attempt made even to steal witnesses favorable to Frank (see Minola McKnight incident, hereinafter discussed), and the attempt made to force an entrance into Frank's cell against his will and compel him to face Conley, (see pages 216 and 217), and bearing in mind the fact that the entire case made out by the prosecution was based in every detail upon the full, free and voluntary statement made by Frank at the Coroner's inquest, we must come to the inevitable conclusion that if ever a man put on trial for his life was entitled to employment of counsel, it was the accused in this case. But as a matter of fact, the record clearly shows that **Frank had nothing whatever to do**

with the employment of counsel. Mr. Sig Montag, Treasurer of the National Pencil Company, and one of Frank's closest friends, explains fully the occasion of Mr. Rosser's and Mr. Haas's presence at the station house on Monday morning. He testified that Frank had a very limited acquaintance in Atlanta and that he (Montag) had heard about nine o'clock Monday morning that Frank had been taken to police headquarters in connection with the murder, his testimony being as follows:

"I knew that he had a very limited acquaintance there, and I therefore telephoned for Mr. Herbert Haas, my personal counsel, and counsel for the Pencil Company, to go down there. Mr. Haas answered that he did not like to leave home that morning, as his wife was expecting a new arrival, so I sent my automobile after him. Mr. Haas came back and said he was refused admittance to Mr. Frank at the station house and said he was going to telephone Mr. Rosser. He then telephoned for Mr. Rosser. That was between half past ten and eleven. Mr. Rosser came down to the station house about thirty or forty minutes later. I saw Mr. Rosser go upstairs." (See page 129).

As to his alleged employment of counsel, Frank in his statement testified as follows:

"I sat in one of the offices that the detectives use, it wasn't the office of Chief Lanford, he hadn't come down yet, that was about between 8 and 8:30 when I got down there. Well, I waited around the office possibly an hour, chatting and talking with the officers that came in and spoke to me, but I still didn't see anything of Chief Lanford; and bye and bye, probably after an hour, half past nine, perhaps, Sig Montag and Herbert J. Haas, a couple of my friends, came up and spoke to me; I was conversing with them, and possibly at 10 o'clock I saw Mr. Luther Rosser come up, and he said: "Hello, Boys, what's the trouble!" And Mr. Haas went up to him,

and spoke to him, and they were talking together and a few minutes later Chief Lanford, who had in the meantime arrived and who seemed to be very busy running in and out answering telephone calls, came in and says: "Come here," and beckoned to me; and I went with him and went into his room, in his office, and while I was in there, to the best of my recollection, anyhow it is my impression now that this very time slip (Defendant's Exhibit 1), on which at that time that "taken out at 8:26," with the two lines under it, had not been erased, was shown to me, and in looking over it and studying it carefully, I found where the interval of an hour had occurred that Saturday night, April 26th. When I had first looked at it, I only noticed that every line had a punch mark on it, but I didn't notice what time the punch marks themselves were on; this time I studied the slip carefully; it was the same slip I had taken out of the clock, Chief Lanford or one of the officers handed it to me at police headquarters, which I absolutely identified with the writing which was on it, which you can readily see if you look now, even though it has been erased. There seemed to be some altercation about Mr. Rosser's coming in that room, and I heard Mr. Rosser say, "I am going into that room, that man is my client;" that was the first intimation I had that Mr. Rosser was going to look after my interests in this matter." (See Brief of Evidence, page 209).

This is a full and complete explanation of how Mr. Rosser and Mr. Haas happened to go to the station house on the Monday morning following the murder, and we respectfully submit that their presence there cannot be charged as a suspicious circumstance against the accused on a charge of murder.

FRANK'S WIFE FAILS TO SEE HIM AT POLICE HEADQUARTERS.

Another alleged incriminating circumstance which the State charges against Frank was the fact that his wife

did not visit him during the few days that he was detained at the station house. It is a fact that during those few days and before he was removed to jail that his wife did not see him and the following are the facts of the matter as they appear from Frank's own statement, and which statement is uncontradicted in the record:

"On April 29, the day I was taken into custody at police headquarters (he being finally arrested on Tuesday after his arrest on Monday) my wife was there to see me. She was down stairs on the first floor. I was on the top floor. She was there almost in hysterics, having been brought there by her two brothers-in-law and her father. Rabbi Marx was with me at the time. I consulted with him as to the advisability of allowing my dear wife to come up on the top floor to see me in those surroundings with city detectives, reporters and snapshotters. I thought I would save her that humiliation and that harsh sight, because I expected any day to be turned loose and to be returned once more to her side at home. Gentlemen, we did all we could do to restrain her in the first days when I was down at the jail from coming on alone down to the jail, but she was perfectly willing to even be locked up with me and share my incarceration." (See Brief of Evidence, page 218).

This action on Frank's part was so obviously the act of a man of refinement and feeling that further comment thereon would be superfluous. Yet this fact was stressed strongly by the State as one of the material factors tending to show Frank's guilt.

STATE CLAIMS FRANK DID NOT LOOK AT CORPSE.

It is claimed by the State that on Sunday morning when Frank was carried by the detectives to the undertakers establishment to see if he could identify the corpse,

he failed to look at the corpse and stepped away. Rogers, State's witness, testified as follows:

"The corpse was lying in a little kind of side out room to the right of a large room. The light was not lit in this little room where the body was lying, and Mr. Gheesling stepped in ahead of me (Gheesling being the undertaker) and went around behind the corpse and lit the light above her head, and her head was lying then towards the wall. I stepped up on the opposite side of the corpse with a door to my left. Mr. Gheesling caught the face of the dead girl and turned it towards me. I looked then to see if anybody followed me and I saw Mr. Frank step from outside of the door into what I thought was a closet, and I have afterwards found it was where Mr. Gheesling slept, or where somebody slept." . . . . . "I didn't see Frank look at the corpse. I don't remember that Frank ever followed me into this room. He may have stopped on the outside of the door, but my back was toward him and I don't know where he stopped. Mr. Gheesling turned the head of the girl over towards me, and I looked around to see who was behind me, and I saw Mr. Frank as he made that movement behind me. He didn't go into the closet as far as I could see, but he got out of my view. He could have looked at the corpse from the time that Mr. Gheesling was going around behind, but he could not have seen her face, because it was lying over towards the wall." (See page 12) . . . (Cross Examination). "Mr. Frank readily consented to go to the undertaker's with us. When we got in the car we told him it was Mary Phagan and he said he could tell whether she was an employee or not by looking at his book—that he knew very few of the girls. Yes, anybody facing the door of the little chapel at the undertaker's could have seen the corpse. As to whether I know that Mr. Frank didn't see the corpse, he could have got a glance at the whole corpse, but when Mr. Gheesling turned the face over no one could have got a good look at the face unless they stepped into the room. . . . . What Mr. Frank and

Mr. Black saw behind my back I cannot say, I don't say that Mr. Frank stepped into that dressing room, but he passed out of my view." (See page 14).

Gheesling, the undertaker, (State's witness), said that Frank, Black and Rogers asked him to show them the body, and he said: "I took them back there, pulled a light, pulled the sheet back, and moved the revolving table and walked out between them. Mr. Frank was near the right hand going in. Mr. Black was at the left."

Frank explains clearly what transpired at the undertaking establishment in the following words:

"We walked down this long passageway (in the undertaker's shop) until we got to a place which was apparently the door to a small room,—very dark in there. The attendant went in and suddenly switched on the electric light, and I saw the body of the little girl. Mr. Rogers walked in the room and stood at my right inside of the door. I stood right in the door, leaning up against the right facing of the door, and Mr. Black was to the left, leaning on the left facing, but a little to my rear, and the attendant, whose name I have since learned was Mr. Gheesling, was on the opposite side of the little cooling table to where I stood. In other words, the table was between him and me. He removed the sheet which was covering the body, and took the head in his hands, turned it over, put his finger exactly where the wound in the left side back of the head was located, put his finger right on it. . . . . After looking at the body I identified the body as that little girl that had been up shortly after noon the day previous and got her money from me. We then left the undertaking establishment, and got in the automobile and rode over to the pencil factory." (See page 202).

Corroborating Frank's statment, we find Sig Montag testifying, on cross-examination, as follows:

"Mr. Frank was very nervous when he was at my house Sunday morning. He had already been to the un-

dertakers. He told me they had taken him into a dark room and flashed on a light and he said he saw the little girl there. He described how she looked. He said her face was scratched and her eye was discolored, and she seemed to have a gash in her head. Her mouth was full of sawdust and he described her in a general way." (See page 130).

Mr. Ursenbach also testified, on cross-examination, as follows:

"He (Mr. Frank) said when he saw the corpse it was a grewsome sight." (See page 126).

We earnestly submit that this disposes finally of the contention so strongly relied on by the State that Frank failed to view the corpse at the undertaking establishment.

LEE'S PUNCHING OF THE TIME SLIP.

On Sunday morning after the murder, the factory time slip was taken out of the clock by Frank in the presence of Starnes and other witnesses, and Frank stated on looking at the slip that it was correctly punched, that is to say, all of the half hours were properly punched by Lee. The State contends that inasmuch as this is not true, that as the slip shows Lee neglected to punch several half hours on the slip, that Frank's statement is strongly suspicious of guilt. As to this Frank testified as follows:

"After taking this slip out Mr. Darley and I casually looked over the slip to see if there were any errors, and we noticed over there that no successive numbers had been skipped,—that is, the numbers on that slip are arranged successively, one, two and three, and the time alongside of each one, and there was no single line skipped; but we didn't notice the actual time shown by the punch. We only noticed that the successive punches

were made at the time which the punches themselves showed.'' (See Frank, page 204).

As to this, Darley admits that he made the same mistake that Frank did on looking over the slip Sunday morning. (See Darley, page 33). Frank wrote on this slip before handing it over to the detectives the following words: ''Taken out at 8:26 A. M.'' These words were erased when the slip was introduced at the trial by the State, the slip having been brought in from the custody of the State, but it was only after Frank had made his statement on the stand charging that these words had been erased that the erasure was explained, Mr. Dorsey, the solicitor-general, then stating in open court that he himself had erased them because he supposed the words to have been put there by the detectives. (See statement at bottom of Defendant's Exhibit 1, Brief of Evidence, page 254). This would seem finally to dispose of the contention that Frank had changed or doctored the time slip, which insinuation permeated the trial below. The record shows that the State itself had erased the identification mark which had been put on the slip by Frank after he handed same over to Chief Lanford. We are not charging that the erasure by the State was done wilfully, but simply set this forth to prove that the record fully bears out Frank's statement in this respect.

DEFENDANT'S GOOD CHARACTER PROVED BY 103 UNIMPEACHABLE WITNESSES.

The record shows that the character of the defendant was gone into extensively. His good character was proved from the time he was a schoolboy up through his college days until the time of this tragedy, and that by people in every walk of life and of every creed—people both connected with the factory and citizens of the com-

munity in general, including a number of his classmates and professors at Cornell. In all, about 103 witnesses, male and female testified to the good character of the defendant. About 50 of these were employees of the factory, a large majority of whom were women.

In rebuttal, the State put up ten women who claimed to have been formerly employed at the Pencil Company, and who swore that Frank's character for lasciviousness was bad. It was not even developed that they had any personal acquaintance whatsoever with Frank or came in contact with him at all. It will also be noted that some of them had only been employed at the factory for three days. (See pages 221, 222). The character witnesses for the defendant will be found on pages 220-221 of the Brief of Evidence.

SPECIFIC INSTANCES SHOWN BY STATE.

The State undertook to show specific acts (whatever inference may be gathered therefrom) against the defendant, in his relation with girls at the factory. For example, one of the defendant's witnesses, Irene Jackson, had testified to the good character of Frank. The State drew from her, on cross-examination, testimony that while she was an employee of the factory, she had never heard the girls say anything about Frank except that they seemed to be afraid of him; that they would never notice him at all, but would go to work when they saw him coming; that Frank would go over the factory, of course, to see that the girls were not idling; that on one occasion a Miss Mayfield was undressing in the dressing room when Frank came to the door, looked in, turned around and walked out; that Miss Mayfield had her top dress off and her old dress in her hand to put on; that Frank smiled, or made some kind of face. This witness further testi-

fied that she heard some remarks two or three times about Frank going into the dressing room; that the second time Frank went into the dressing room her sister was lying down there; that she had her feet on a stool; that she was dressed; that Frank just walked in, turned, and walked out; that the same thing occurred on another occasion when Mamie Kitchens was in there; that Frank never said anything on those three occasions when he walked in and walked out. (See page 172). On redirect examination, this witness stated that after the murder her father made her quit the factory; that there were two windows in the dressing room which opened on Forsyth Street; that there had been complaints of the girls flirting through these windows; that the orders were against the girls flirting; that Frank never came into the room at all; that he simply pushed the door open and looked in; that she did not know if Frank knew the girls were in there; that she heard Frank say to Miss McClellan (a forelady) that he did not want the girls flirting out of the windows from that room. (See page 172).

To this testimony of Irene Jackson, Miss Emily Mayfield denied that Frank ever came in the dressing room while she was undressing and denied that Frank ever came in the dressing room while Irene Jackson and her sister were there. (See pages 219 and 220). Miss Mamie Kitchens testified, as to one of the dressing room episodes, that Frank opened the door and put his head inside and when the women said they were dressing, he shut the door. She further said that "Frank asked us if we didn't have any work to do" and she stated that this occurred during business hours. (See page 222). Defendant in his statement, with reference to this alleged incident, testified as follows:

"In reply to the statement of Miss Irene Jackson, she is wholly mistaken in supposing that I ever went to a ladies' dressing room for the purpose of making improper gaze into the girls room. I have no recollection of occasions of which she speaks, but I do not know that that ladies' dressing room on the fourth floor is a mere room in which the girls change their outer clothing. There was no bath or toilet in that room, and it had windows opening into the street. There was no lock on the door and I know I never went into that room at any hour when the girls were dressing. These girls were supposed to be at their work at seven o'clock. Occasionally I have had reports that the girls were flirting from this dressing room through the windows with men. It is also true that sometimes the girls would loiter in this room when they ought to have been doing their work. It is possible that on some occasions I looked into this room to see if the girls were doing their duty and were not using this room as a place for loitering and for flirting. These girls were not supposed to be dressing in that room after seven o'clock and I know that I never looked into that room at any hour when I had any reason to suppose that there were girls dressing therein." (See page 218).

Ruth Robinson testified that she had seen Frank talk to Mary Phagan about her work; that Frank would just tell her about her work and show her how to put rubbers in pencils; that she heard him speak to her in this connection, calling her "Mary." (See page 222).

A girl by the name of Dewey Hewell, brought from the Home of the Good Shepherds in Cincinnati, stated that she had worked at the factory for a while; that she had seen Frank talk to Mary Phagan in the metal room, two or three times, and had seen him put his hand on her shoulder; that he called her "Mary" and would stand pretty close to her; that all the rest of the girls were there when he talked to her. (See page 222).

With respect to this testimony, we submit that Frank could have done and said nothing improper if all of the rest of the girls were around at the time, as testified to by the witness. As to this, Frank in his statement says:

"In reply to the two girls Robinson and Hewell that they saw me talk to Mary Phagan; that I called her "Mary," I wish to say that they are mistaken. It is very possible that I have talked to the little girl in going through the factory examining the work, but I never knew her name either to call her Mary Phagan, Miss Phagan or Mary." (See page 242).

Two women by the name of Myrtice Cato and Maggie Griffin testified that they had seen Miss Rebecca Carson, a forelady at the factory, go into the dressing room with Frank on the fourth floor two or three times; that there were other women working on the floor at the time this happened. (See page 223). This testimony was emphatically denied by Miss Carson. (See page 222). The defendant's statement as to this is as follows:

"In reference to the statements of the two women who say that they saw me going into the dressing room with Miss Rebecca Carson, I wish to state that is utterly false; it is a slander on the young lady, and I wish to state that as far as my knowledge of Miss Rebecca Carson goes, she is a lady of unblemished character." (See page 242).

Miss Mattie Thompson, who worked on the fourth floor with Irene Jackson, testified that she had made complaint about the girls flirting out of the windows in the dressing room with men on the street; that after seven o'clock, which was the time of the occurrences related by Irene Jackson, that the girls were not supposed to be in the dressing room; that there was no toilet or bath in the dressing room, or lock on the door; that the elderly ladies in the factory had complained of the girls flirting out of the windows with men; that they would stand in the

windows and flirt with the men on the street; that the girls did not go into the dressing room to dress, but would only go in there to change their outer clothes before work time.

We submit in view of the above testimony that even if Frank did go into the dressing room as related, he did so simply in performance of his duties as superintendent of the factory and to see that the girls were not wasting the time for which they were paid.

DALTON CLAIMS TO HAVE CARRIED WOMEN TO THE FACTORY AND TO HAVE MET FRANK.

The State also put up a witness by the name of Dalton, who testified that on several occasions during the year 1912, he had visited the pencil factory for immoral purposes with a woman named Daisy Hopkins; that on one of these occasions Daisy Hopkins had taken him into a room where Frank was, and introduced him to Frank; that he had seen Frank on these occasions in his private office with some ladies, may be two and sometimes one; that a negro named Jim Conley (The State's main witness) would be at the elevator and let him in on one of these Saturdays when he visited the factory; that he did not know whether the women in Frank's office with him were stenographers or not; that on one of the visits Dalton made, Frank was not in there; that Dalton would go down the ladder into the basement with the woman Daisy Hopkins; that when he saw Frank in his office it would be about two o'clock on these Saturdays; that the curtains were not drawn and it was light in there; that Dalton did not know whether Frank knew he (Dalton) was taking Daisy Hopkins into the basement or not.

As to this witness, Dalton, witness after witness, em-

ployees of the National Pencil Company, testified that Dalton was never known to visit the factory and was never seen there, and that he had never met Mr. Frank. In addition to this, fifteen witnesses from his former home in Gwinett and Walton County, testified that he was a man of bad character and that they would not believe him on oath. (See pages 134 and 135). In addition to this, the record shows that he was three times indicted and convicted of larceny. (See Defendant's Exhibit 89, page 303).

Daisy Hopkins denied the truth of Dalton's statement with reference to herself and said she had never been to the factory with him for any purpose whatsoever and had never introduced him to Frank. (See page 134).

Miss Laura Atkinson denied that she had ever walked home from the factory with Dalton (see page 135), and Miss Minnie Smith asserted that she did not even know Dalton, had never met him and never walked home with him. (See page 135).

With respect to Dalton's testimony, the defendant testified as follows:

"The statement of the witness Dalton is utterly false as far as coming to my office and being introduced to me by the woman, Daisy Hopkins, is concerned. If Dalton was ever in the factory with any woman, I don't know it. I never saw Dalton in my life to know him until this crime. (Page 218).

STATE WITNESS TURNER CLAIMS TO HAVE SEEN FRANK TALK TO MARY PHAGAN SEVERAL WEEKS BEFORE TRAGEDY.

A young boy by the name of Turner testified that he worked at the factory during March, 1913; that he saw Frank talking to Mary Phagan about the middle of

March just before dinner; that she was going to work and he stopped to talk to her and told her she must go to work; that he told her he was superintendent of the factory and that he wanted to talk to her, and she said she had to go to work; that she backed off, but went on towards her talking to her; that this was all he heard. He said the girls were getting ready to go to dinner; that Mary Phagan was going in one direction and Frank in the other; that this occurred right near Quinn's (the foreman's) office; that the other girls came in there while the conversation was going on. The witness was unable to describe Mary Phagan; he said he didn't know any of the other girls in there; that he did not remember who called her Mary Phagan; that a young man on the fourth floor told him her name was Mary Phagan; that he didn't know who the young man was; that he didn't know anybody at the factory; that he couldn't describe any of the girls. (See page 223).

We respectfully submit that this testimony is absolutely improbable and incredible on its face.

As to this, Frank says: "In reply to the statement of the boy that he saw me talk to Mary Phagan; that she backed away from me, that is absolutely false; that never occurred." (See page 242).

MINOLA McKNIGHT EPISODE.

Minola McKnight was a cook in the Selig household where Frank and his wife lived. She testified as to Frank leaving the house after breakfast on Saturday, April 26th, as to his coming home to dinner about twenty minutes after one; as to his eating dinner and as to his leaving home for the factory.

Some time after Frank was arrested, Solicitor Dorsey secured an affidavit from Minola McKnight. It appears

that the detectives were not satisfied with this affidavit because it was favorable to Frank, and to show what then happened to Minola McKnight, we quote her testimony as it appears on page 109:

"After this happened the detectives came out and arrested me and took me to Mr. Dorsey's office, where Mr. Dorsey, my husband and another man were there. I was working at the Selig's when they came and got me. They tried to get me to say that Mr. Frank would not allow his wife to sleep that night, and that he told her to get up and get his gun and let him kill himself, and that he made her get out of bed. They had my husband there to bulldoze me, claiming that I had told him that. I had never told him anything of the kind. I told them right there in Mr. Dorsey's office that it was a lie. Then they carried me down to the station house in the patrol wagon. They came to me for another statement about half past eleven or twelve o'clock that night, and made me sign something before they turned me loose, but it wasn't true. I signed it to get out of jail, because they said they would not let me out. It was all written out for me before they made me sign it. . . . (Cross-examination, page 110). That man sitting right there (pointing to Mr. Campbell, a city detective) and a whole lot of men wanted me to tell lies; they wanted me to witness to what my husband was saying. My husband tried to get me to tell lies. They made me sign that statement, but it was a lie."

At the trial the court permitted the State to introduce portions of her affidavit made under the duress above recited, this affidavit being State's Exhibit J, found on page 245, Brief of Evidence. Minola McKnight characterized the entire affidavit as wholly false, and further that she signed it to be released from the station house where she was imprisoned without any charge whatever, no warrant being sworn out for her arrest. (See page 110). Mr. and Mrs. Selig testified that the facts stated in the affidavit

were a pure fabrication and without any foundation in fact. (See pages 110 and 128).

Detective Starnes (State's witness) virtually sustains Minola McKnight as to the circumstance under which this affidavit was extorted from her, this witness making the astounding confession that he arrested Minola McKnight to get a statement from her, his evidence being as follows:

"Campbell and I arrested Minola McKnight to get a statement from her. We turned her over to the patrol wagon and we never saw her any more until the following day, when we called Mr. Craven and Mr. Pickett, who were the employers of Minola McKnight's husband, to come down and interview her. . . . (Cross Examination). As to the authority I had to lock her up, it was reasonable and right that she should be locked up. I did that for the best interest of the case I was working on. No, I didn't have any warrant for her arrest. She was brought to Mr. Dorsey's office by a bailiff by a subpoena. I took her away from Dorsey's office, and put her in a patrol wagon. I expect Mr. Dorsey knew we were going to lock her up, but he did not tell us to do it. No, he didn't disapprove of it. I didn't know anything about her having made a previous statement to Mr. Dorsey. I think Mr. Dorsey said she had made such a statement. I saw her the next day in the station house. She didn't scream after leaving Dorsey's office until she reached the sidewalk, and then she commenced 'hollering' and carrying on that she was going to jail; that she didn't know anything about it, or something like that. No, I had no warrant for her arrest. She had committed no crime. I held her to get the truth. Mr. Dorsey told me I could turn her loose as I pleased. That was after she made the statement." (See page 235).

It appears from the testimony of Mr. George Gordon, an attorney-at-law, who was put up by the State, that after this woman had been imprisoned, he was employed

to secure her release and tried to get her released at once, but Detective Starnes would not release the woman from the station house until he had secured Mr. Dorsey's consent. (See pages 224 and 225). Mr. Gordon testified that he was employed to take out a habeas corpus to release Minola McKnight; that he was outside of the door most of the time the detectives were securing her statement, having waited outside for about two hours; that during this time various people went in and out of the door; that after seeing the police-stenographer (February) go into the room, he made demand to be allowed to enter the room and on entering, found that the affidavit had already been written out in shorthand, and the stenographer was reading the statement to the woman; that in the room at the time were two men, Craven and Pickett, who were the employers of Albert McKnight, her husband, and that Albert McKnight himself was there, together with Detectives Campbell and Starnes; that the stenographer wrote it off on his typewriter and Starnes stated the matter must be kept very quiet and nobody told anything about it; that Mr. Gordon stated to Starnes that "there is no reason you should hold this woman, you should let her go"; that Starnes said he could do nothing without the consent of Mr. Dorsey. Mr. Gordon went to Mr. Dorsey's office; that the latter called up Starnes and Mr. Gordon then went back to police headquarters and asked Starnes to call up Mr. Dorsey. Mr. Gordon further stated that while he was at police headquarters endeavoring to secure her release (having left the woman in Mr. Dorsey's office), that the woman signed the paper in his absence and that when he returned to Mr. Dorsey's office, he saw the paper lying on the table already signed, and the woman was thereafter released. (See evidence of George Gordon, page 225).

Detective Starnes testified that on the morning of that day, Mr. Dorsey told him he would not release her unless Gordon took out a habeas corpus.

Gordon testified that Beavers, Chief of Police, told Gordon he would not let her go out on bond unless Dorsey agreed to let her go, and that in the morning Gordon had gone to Dorsey's office and had told him the woman was being illegally held and that Dorsey admitted it and Gordon then said that the woman would give bond in any sum that Mr. Dorsey would ask; that Mr. Dorsey then said he could not let the woman go because he would "get in bad with the detectives" and Mr. Dorsey advised Mr. Gordon to take out a writ of habeas corpus; that the detectives then said they would not let her go without Mr. Dorsey's consent; that Mr. Dorsey then said he didn't have anything to do with locking her up. (See pages 225 and 235).

We respectfully submit that the above incident shows a bald, palpable effort on the part of the prosecution to steal a witness favorable to the defence and in our opinion is as great an outrage as was ever disclosed in a criminal trial, and when we bear in mind that it is done in a case in which a decent, respectable white man is on trial for his life, it makes us indeed meditate upon the enormity of the offense. We fully realize that these are grave charges against those representatives of the State of Georgia responsible for the outrage, but earnestly insist that our charges are fully borne out by the record.

SOLICITOR DORSEY SUBPOENAES WITNESSES TO HIS OFFICE.

Fully in keeping with the above illegal method of obtaining evidence, was the procedure adopted by the prosecution in order to interview witnesses. It appears that various witnesses, who were known to be in possession

of evidence favorable to the defence, were interviewed by the Solicitor and the detectives by being forced to come to the Solicitor's office by means of a subpoena issued by Solicitor Dorsey. (See evidence of Darley, page 36; Holloway, page 80; Campbell, page 106; Barrett, page 27). Is it possible that this honorable court can approve of such methods? Each of these witnesses testified that they thought they were compelled under constraint of the law to obey the subpoenaes so served upon them.

STATE ENDEAVORS TO SHOW STREET CARS SOMETIMES RUN AHEAD OF SCHEDULE.

In order to rebut the testimony of their own witness, George Epps, as to the time that he and Mary Phagan rode into town on Saturday, (he having testified that they arrived at 12:07), the State endeavored to show that sometimes street cars, in violation of rules, run ahead of their schedule time. There was no evidence whatever that the car on which Mary Phagan rode was ahead of its schedule. On the contrary, Epps, and the conductor and motorman in charge of the car, all testified that the car reached the center of town on schedule time, which was 12:07. (See Epps, page 1; Matthews, page 84; Hollis, page 85). Yet the state was permitted by the court to prove that motormen sometimes run ahead of schedule; that the men were demerited and punished for so doing, but that sometimes it happened anyhow. (See Leach, page 153; Hoffman, page 229; Hendricks, page 229; Ingram, page 231; McEwing, page 229; Owens, page 231). The utter irrelevancy and absurdity of this testimoney so far as it tends to show the time of arrival of the car that Mary Phagan rode on, is hereinafter dilated upon.

BLOOD STAINS AND HAIR IN METAL ROOM.

It is contended by the State that the alleged blood spots and hair found in the metal room is a suspicious circumstance tending to show Frank's guilt. The ladies' dressing room in the metal room is a small compartment to the south side of the entrance where the women change their street clothes to working clothes. On Sunday morning, after the tragedy, numbers of people searched through the building and went through the metal department, and no signs of blood or hair attracted their attention. Chief Lanford, Detectives Starnes and Black and others were among those who searched on that morning. (Darley, page 35; Frank, page 204). The next day, Monday, a man named Barrett, claimed to discover some dark spots with a white substance, known as hascoline, smeared over it; that there was also on a lathe on the north side of the metal room, three or four strands of hair. (See Barrett, page 52). This hascoline was usually found all about the metal room in the buckets into which it dripped from the machines, and for that reason frequently dropped upon the floor. (See Holloway, page 30; Quinn, page 106; Frank, pages 211 and 212; Schiff, page 97. A number of girls worked in the metal room and one of them named Magnolia Kennedy had hair about the color of Mary Phagan. Between this lathe and the windows of the room was a gas jet and the girls would curl their hair at this gas jet and the wind would naturally blow from the windows towards the lathe on which the strands of hair was claimed to have been found by Barrett. (See Quinn, page 106). The strands of hair were never produced. Whether they were hair or not, is a matter of doubt. The hascoline which is claimed was smeared over the spots to conceal them did not in fact hide the spots in any way. (See Stelker, page 138; Dar-

ley, page 33). The spots still remained visible through the hascoline. In other words, if it was smeared over simply to hide the spots, it merely resulted in showing the spots together with the attempt to hide. No claim was made that blood was found under the lathe where the strands of hair was supposed to have been found, nor was there any blood at that place in the metal room where Jim Conley afterwards claimed the body was lying. It further appears that the floor of the metal room had never been scoured or washed and was a dirty, greasy floor. (See evidence of Quinn, page 106; Holloway, page 30; Schiff, page 92; Greenfield, page 142; Kennedy, page 105). It was further testified that accidents frequently happened to employees in the factory, and that in the fall of 1912 two men were badly hurt and that the blood from their wounds was scattered over this place in the metal room. (See evidence of Quinn, page 106; Lee, page 133; Montag, page 129; Schiff, pages 92 and 100).

It was also shown by Mrs. Carson and by Darley and other witnesses that in a place like this, where numbers of women worked, that it was nothing unusual to find blood spots around the toilets and near the entrance of ladies' dressing rooms. (See Mrs. Carson, page 118; and Darley, page 35).

The alleged blood spots, so found by Barrett, were taken to Claude Smith, a chemist. There were four or five chips of wood with red spots on them given to Dr. Smith. (See Brief of Evidence, page 73 and State's Exhibit E, page 245). Only one of the spots turned out to be blood, and there were only four or five blood corpuscles shown on that. Smith did not know whether it was human blood or not. All mammalian blood is alike. Smith could not say how long the blood had been there. He had known blood corpuscles to keep for several years. A

drop or half a drop of blood would have caused all the corpuscles that Smith found. Smith's evidence is as follows:

"I found grit and stain on all of the chips. I couldn't tell the one that I found blood on. I did the work in the ordinary way. The whole surface of the chips was coated with dirt. I couldn't tell whether the blood stain was fresh or old. I have kept blood corpuscles in the laboratory for several years. I found probably three or four or five blood corpuscles in a field. I don't know how much blood was there. A drop or half drop would have caused it, or even less than that." (See page 46).

It will thus be seen that the greater number of the spots found by the State were not blood spots at all, and it is entirely probable that the few blood corpuscles Smith found were not from anything which appeared to the eyes as a stain at all, but was perhaps a drop of blood which had been at this place and on this dirty floor for years. Inasmuch as any mammalian blood could have produced it, it might have been the blood of a mouse, or it might have been the blood of the men who were injured and brought by this place, or it might have been the blood of a woman in menstruation and may have been there for years. In any event, we cannot conceive how the presence of these spots—whatever they may be—can be charged as a suspicious circumstance against Frank.

We contend that the finding of the alleged blood spots can not be charged as an incriminating circumstance against Frank for the following reasons:

1. On the morning after the tragedy, Lanford, Black, Starnes, Montag, Frank, Darley and others passed on a tour of discovery, through the metal room, and saw no blood stains or hascoline on the floor.

2. We have already shown that several men who had been injured, bled at or about this spot and that

with a large number of women employees, blood was frequently found in front of dressing rooms.

3. The chemist, on three of the four chips which had these suspicious spots on them, found them not to be blood at all, and on the fourth one, found blood which he could not swear exceeded a drop, and he didn't undertake to say how long the blood had been there and said it could have been there for years. This would make it entirely probable that it was the blood of some of the injured men which had remained on this grease-soaked floor, or was the blood of some of the women.

4. The testimony shows that the floor was never washed, but was swept over every day and that if hascoline had been spilled on this spot as it was on many spots, the hascoline which was smeared on the spots in question had been so smeared by the sweeper.

5. The alleged blood spots and hair can amount to nothing, because under the machine where the hair was found, there was not a trace of any blood. If the girl had been hurt at this machine and had entangled some of her hair in it, all the medical testimony showed that the blood from the head wound would have flowed at the first injury and blood would naturally have been found at this place. There was no blood at this place—likewise at the place where Conley said the body lay there was no blood. There was much more likelihood of blood having been found where the body was lying than where Conley claims he dropped it, in front of the dressing room, where alleged blood spots were found.

6. The State claimed that Frank might have wiped up the blood at the place where the hair was found and where the body lay. Isn't it remarkable that if he could have wiped up the blood at these two places so well as

to leave no trace, that he could not have wiped it up where the body was dropped. Instead of wiping it up where the body dropped, it was smeared over with hascoline, but smeared in such a way as to leave the spots perfectly visible.

7. Even if the girl were killed in the metal room, Conley could as well have killed her as Frank.

FRANK, AT FIRST, THE ONLY PERSON KNOWN TO BE IN FACTORY BELOW FOURTH FLOOR.

The foregoing summary shows those facts which the State relied on outside of the evidence of Conley.

Except for the testimony of Mrs. White, which will be referred to later, it was not known that any person was in the factory below the fourth floor except Frank, who was at work in his office on the second floor. It was known that White, Mrs. White and Denham were on the fourth floor, and it was known, of course, that they had access to all parts of the building.

MRS. WHITE'S SEEING NEGRO ON FIRST FLOOR BECOMES KNOWN.

On Monday after the tragedy, Mrs. White made it known that in either going up or going down the stairs, she had seen a negro near the staircase and elevator shaft on the first floor, but she did not know who he was. (See evidence of Mrs. White, page 21). Mrs .White's brother, Wade Campbell, stated that Mrs. White told him on the Monday following the tragedy that she had seen a negro as she was ascending the stairs. (See evidence of Campbell, page 105). Mrs. White on the trial states that she saw the negro as she came down the stairs. (See evidence of Mrs. White, page 21).

GROUND FLOOR TYPICAL PLACE FOR ASSAILANT TO HIDE.

The first, or ground floor, was an ideal spot for an assailant to hide for the purpose of assault or robbery. As is shown by the evidence, it is very dark. (See Darley, page 36; Schiff, page 92). The only route to ascend from the first to the second floor is a stairway thirty-nine feet from Forsyth Street (see plat of first floor, Defendant's Exhibit 61, page 301-A), and in the area around the foot of the stairway on the right was a number of large empty packing cases. (See McCrary, page 131). The elevator shaft yawned dark, deep and open at this place, and a person intending mischief towards anyone going up or down the stairs could lie in wait in the darkness behind the boxes and escape attention.

NEGRO CONLEY ARRESTED.

On May 2, Holloway, the watchman at the factory, caught Conley in the act of washing a shirt—Conley being a negro sweeper and general hand about the factory. (See Holloway, page 79). Several of the employees of the factory had suspected Conley before this and had, with more or less directness, charged him with knowing something about the matter. (See evidence of Mrs. Carson, page 118, Miss Pirk, page 119; Mrs. Small, page 120). Conley had been seen reading with great avidity the extra newspapers dealing with the crime. (See evidence of Miss Fuss, page 121; Mrs. Small, page 120; and Schiff, page 92). Darley testified as follows: "I saw Conley on Monday, he looked to be excited and when I spoke to him he failed to look up as he usually does. I went around the factory that morning and looked at

everybody to see if I could pick out the man that looked suspicious and Jim Conley was the man I thought looked most suspicious.'' (See pages 75 and 76).

The following conversation took place between Mrs. Carson and the negro Conley; (see page 118: ''I saw Jim on Tuesday after the murder, he was sweeping around my table. I said: 'Well, Jim they haven't got you yet,' and he says, 'No.' On Wednesday, I says the same thing and he answered the same thing. On Thursday when I said that to him again, he said: 'I aint done nothing.' I said, 'Jim, you know Mr. Frank never did that,' and he says, 'No, Mr. Frank is as innocent as you is, and I know you is.' I said 'Jim, whenever they find the murderer of Mary Phagan, it is going to be that negro who was sitting near the elevator when Mrs. White went upstairs.' He laid his broom down and went out.''

The record also shows that on Monday following the murder, Miss Mary Pirk, an employee of the factory talked with Jim Conley and accused him of the murder; that he thereupon took the broom and walked right out of the office and that she had never seen him since. (See page 119). The record also shows that Conley told Mrs. Dora Small, another employee of the factory that ''Mr. Frank is just as innocent as I am, and he says God knows I was noways around this factory on Saturday.'' Miss Julia Fuss, another lady employee of the factory testified that Conley told her that ''he believed Mr. Frank was just as innocent as the angels from Heaven.'' As further confirmation of the above, Schiff testifies (page 92) as follows:

''As I went out of the shipping room, that morning (Monday), I saw Conley standing in the back room, and I said: 'What are you doing here?' He says, 'I am scared to go out. I would give a million dollars if I was a white man.' ''

CONLEY'S RECORD.

Conley is shown by the evidence to be a negro with a bad criminal record.

He has repeatedly served in the city stockade. (See evidence of Conley, on cross-examination, page 63, and the record of his various incarcerations, State's Exhibit T, page 251). The evidence of Walter Pride (page 134) shows, to the list of his other misdeeds, is added the crime of forgery, and according to Miss Annie Osborn page 220; Rebecca Carson, page 220; Maud Wright, page 220; Julia Fuss, page 221; Emma Freeman, page 171; Ida Hays, page 170; Eula May Flowers, page 171; Opie Dickerson, page 171; Dora Small, page 120; Joe Stelker, page 138; Arthur Pride, page 134, all of whom were employees of the factory and had ample occasion to observe and deal with Conley from day to day, Conley is not to be believed under oath.

FIRST SUSPICIONS: EVIDENCE AGAINST CONLEY.

Conley at first vehemently denied that he could write. (See evidence of Scott, page 80; Conley, page 59). Every suspect was rigorously examined on their ability to write and specimens of their handwriting were subjected to the closest scrutiny and comparisons were made with the notes found beside the body of Mary Phagan. The reason for this is obvious. It was supposed (and we submit well supposed) that whoever wrote the notes committed the murder.

About May 15, Pinkerton Detective McWorth, making investigations at the pencil factory, made inquiry if Conley could write, and was assured by employees of the factory that Conley could write; that he had signed con-

tracts for the purchase of watches and orders upon the pay master for part of his wages. (See Evidence of Scott, page 80; Frank's Statement, page 221; Schiff, page 97). Investigation of orders which Conley had given upon the factory for part of his wages disclosed contracts signed by Conley and comparison with the notes found beside the body showed the writing on the contracts and on the notes to be identical.

CONLEY CONFRONTED WITH HANDWRITING.

It was at once regarded as significant that Conley denied he could write. For a time he persisted in his denial that he could write, but finally admitted that he could write when shown his handwriting by the detectives. Even after the detectives confronted him with his handwriting he stoutly denied any knowledge of the crime, but finally began making his series of confessions.

MRS. WHITE CARRIED TO PRISON TO IDENTIFY CONLEY.

Though Pinkerton Detective Scott, who was working hand in glove with the city detectives, was informed by Frank on the Monday following the tragedy that Mrs. White had seen a negro in the area-way around the stairway on the day of the crime at noon, Mrs. White was not called upon to identify any of the negro suspects held at the police station until after the discovery that Conley could write. In fact little or no attention was paid to Conley when he was first arrested, because there were so many other people under suspicion. After Conley's admission that he could write, Mrs. White was taken to the city prison to identify him. She was unable to say whether or not he was the negro she saw sitting among

the packing cases in the dark area around the stairway. (See Mrs. White, page 74). While she looked at the various negroes shown her, it was testified that Conley tried to conceal his face, making some kind of grimace to escape identification. (See evidence of Scott, page 80).

CONLEY'S FIRST STATEMENT.

After Mrs. White's departure from the prison, on Sunday, May 18, Conley made his first statement in writing and same is attached as defendant's exhibit 36, page 281 of the evidence, and substantially admits that he, Conley, is living with a woman who is not his wife; that he had been working at the pencil factory as a roustabout for two years; that on Saturday, April 26th, he arose between nine and half past nine, ate his breakfast, and at 10:30 left home, and going to Peters Street visited a number of saloons, purchasing a half pint of Rye whiskey from a negro at one, for which he paid 40 cents; that he subsequently visited another saloon called the "Butt Inn," and shot dice with three colored men, winning 90 cents from them; that he then purchased some beer for 15 cents; that he then visited Early's Beer Saloon, buying two beers for ten cents; that he arrived home at half past two and gives detailed accounts of what he did the balance of the evening, dealing with such matters as sending out again and buying beer, buying stove wood, sausage and the like. In this first statement he claims not to have known anything about the tragedy, and does **not** place himself at factory at all on the day of the murder.

CONLEY'S SECOND STATEMENT.

The detective Scott shows that the detectives worked with Conley strenuously to get him to admit he knew something, and called his attention to all the facts they had against him, especially his ability to write and similarity of his handwriting to that of the notes. (See testimony of Scott, page 81). Finally Conley made a confession that he wrote the notes. (See defendant's exhibit 37, page 282). In this confession, Conley in effect said that his previous written statement was false and that on Friday before the tragedy of Saturday, and about four minutes to one o'clock, Frank came to where he was working on the fourth floor of the factory, and asked Conley to come to his office; that on going to Frank's office, Frank asked Conley if he could write and upon Conley saying Yes, he could write a little bit, thereupon Frank gave him scratch pad and told him to put on there: "Dear Mother: A long, tall, black negro did this by hisself," and Frank told him to write it two or three times and he did write it on a white scratch pad; that Frank then went to his desk and pulled out another brown scratch pad and wrote on that himself; that Frank asked Conley if he wanted a cigarette and Conley told him Yes, but they didn't allow smoking in the factory; and Frank pulled out a box of cigarettes and in that box there was $2.50 and when Conley handed the box back to Frank telling Frank there was money in the box, Frank said that that was all right; he was a good working negro—to take it. That Frank then asked him where a certain other negro, Bailey, was, and Frank asked Conley if he knew the night watchman, and upon Conley saying No, Frank asked Conley if he ever saw the night watchman in the basement and that then Frank laughed and jollied with him and Conley

asked Frank not to take out some money on a watch which Conley owed and had given an order for, and Frank promised not to do so and that he would see about Conley getting some money a little later; that Frank then told Conley that he had wealthy people in Brooklyn, and that then Frank held his head up and looked out the corner of his eyes and said: "Why should I hang!" That when Conley asked Frank not to take out the money for the watch, that Frank said: "You ought not to buy any watch, for that big, fat wife of mine wants me to buy her an automobile, but I won't do it;" that on Tuesday after the tragedy Frank came up the aisle where Conley was sweeping and held his head over Conley and said: "Be a good boy." This statement was signed and sworn to by Conley. It will be noted that in this affidavit Conley states that he wrote the notes on Friday. It will further be noted that Conley still does not put himself at the factory on the day of the murder. Pinkerton detective Scott (State's witness) states that after this first affidavit (Conley's second statement) he and detective Black pressed Conley to change it and make it, as they contended, "more reasonable." To use Scott's words, "writing the notes on Friday would not do." (See testimony of Scott, page 81).

CONLEY'S THIRD STATEMENT.

Four days later, the detectives got another statement from Conley (Defendant's exhibit 38, on page 283 of the evidence. This statement is signed and sworn to. In this affidavit Conley makes a number of changes from his first affidavit, but now states that he made the first affidavit to read "Friday" in order that he might not be accused of knowing anything of the murder, because he thought

that "if he put himself there Saturday, he might have been accused of having a hand in it;" and he now makes his second affidavit (third statement) freely and voluntarily after thinking over the situation and that he has made up his mind to tell the whole truth without the promise of reward or fear of punishment. His affidavit in detail follows:

"I got up Saurday morning, April 26th, between nine and half past 9. I was at home, 172 Rhodes Street. There is a clock on the Atlanta University; and I looked at that clock after I put on my clothes. I went to the door and poured some water out of the wash pan and then I looked at the clock on the Atlanta University, but I forget what time it was exactly but I remember it was between nine and half past nine. Then I washed my face and ate some steak and some liver and bread and drank a cup of tea, and then I sat down in a chair a little while—about 10 minutes, I guess; and then I told my wife to give me back the three dollars and I would get her some paper money to keep her from losing it, to pay her rent with, and she give it to me, and I told her I was going to Peters Street and I went to Peters Street and stopped at the beer saloon at the corner of Peters and Haynes Sts. and I bought two beers there for myself and give another fellow a beer—I don't know what his name was but they call him Bob. I don't know where he works but he had a whip over his shoulder. I stayed in that saloon three or four minutes—just long enough to drink that beer; and then I walks up to the Butt Inn Saloon and walks back to the pool table and there was four fellows back there shooting dice—five with me—one was named Joe Bobs and one was named Bob Williams; and I won 90 cents; I don't know how long we were shooting for we were shooting on the sly unbeknownst to the bar tender. I guess we were shooting about ten minutes; and then I came to the bar and bought a glass of beer there at the Butt Inn Saloon; then I went to Early's Beer saloon on Peters Street and I

bought a glass of beer there and I walked back to the toilet and stood there and made a cigarette and then bought another glass of beer; and I come out and bought a half pint of whiskey and I drank some of the whiskey and then I started to the Capital City Laundry, and on my way there I met Mr. Frank, at the corner of Forsyth and Nelson Sts., going to Montag's and he told me to wait a minute and he asked me where I was going and I told him I was going to the Capital City Laundry to see my mother, and he didn't say nothing, only he said to wait a minute while he came back—that he was going to see the Montags, and I stood there until he came back; he was gone about 20 minutes, I guess. He came back and told me to come to the factory, that he wanted to see me, and I went to the factory with him, walking behind him, and he stopped at the Curtis Drug Store on Forsyth and Mitchell Sts. and he got a drink and I waited on the outside until he come out, and then he told me to come on, and I went to the factory with him. He had a box with him, which he carried with him to the Montags, it had an opener to it; and after we got to the factory Mr. Frank took the box and put it there at the trash barrel, which was just to the right of the steps as you go in; he put the box there for me to sit on. There were some great big boxes back further. He told me to sit down there until I heard him whistle. He just took his foot and pushed a box over there for me to sit on. Then he told me not to let Mr. Darley see me and after Mr. Frank went up the steps, in a few minutes here comes a lady down stairs; that was Miss Mattie; I think she had on a dark red suit and a rain coat and a parasol in her hand, but I didn't notice her hat. Then here comes Mr. Darley down, and he had on a gray suit of clothes; didn't have any hat on his head, and he stopped Miss Mattie at the front door, and when he stopped her I saw Miss Mattie with a handkerchief wiping her eyes; it seemed to me like she had been crying, and then I heard Mr. Darley say to her, "don't worry; I will see that you get that next week;" and they stood there and talked awhile but

I couldn't hear anything else they said; then she went on out the door and Mr. Darley came back up the steps and Mr. Darley stayed up there a good while; then he come down and left and I did not see him any more. Then here comes Mr. Holloway down, about five minutes after Mr. Darley had gone; Mr. Holloway went out on the sidewalk and stood there 3 or 5 minutes and then he come and went back up the steps, and then here come another colored fellow, a pegged legged one, and he went up the steps; he had some bills in his hands; and Mr. Holloway come back down with the pegged legged one and went out on the sidewalk and looked at the fellow's wagon, but what he said to him I don't know. It was a wagon that had sides to it, and I didn't see the name on it. It wasn't a regular dray, I don't think; it looked like it might have come from the plate glass company on Alabama St. Then Mr. Holloway went back up stairs and it wasn't long before Mr. Holloway come back down and was gone for good. I don't know how long, but I guess he stayed upstairs long enough to put on his coat and hat. I saw Mr. Holloway turn up to his right towards Hunter St. Then here comes another lady into the factory; she had on a green looking dress; she works on the fourth floor; and she walked with her head down, —sort of stoop shouldered. She works for Arthur White. She stayed up there 7 or 8 minutes and then she come back down with her money in her hand and she stood just a little opposite me and tore the envelope open right there and took her money out and counted it and she shut her hand up and went out the door and she turned towards Hunter St. and about 15 or 20 minutes after there, there wasn't any passing at all, and I set there on the box with my head against the trash barrel. I stretched my feet out and put my hat in my lap, but I couldn't say whether I went to sleep or not and the next thing that attracted my attention, Mr. Frank whistled for me twice, just like this (indicating) and when he whistled I went on up the stairs and the double doors on the stairway were closed and I opened them and they shut themselves, and Mr.

Frank was standing at the top of the steps and he said: "You heard me—did you?" and I said "Yes, sir." And Mr. Frank grabbed me by the arm and he was squeezing my arm so tight his hand was trembling. He had his glasses on and he had me just like he was walking down the street with a lady, and like he didn't want me to look behind me at all, and I thought it was because he had me so tight that made him tremble, and he carried me through the first office and into his private office, and then he come back in there, and he didn't say nothing. He grabbed up a box of sulphur matches and he went back in the outer office; the door was open between his office and the outer office; and then he saw two ladies coming and he said to me, "Gee! Here comes Miss Emma Clark and Miss Corinthia Hall!" And he come back in there to me; and he was walking fast and seemed to be excited and he said to me: "Come right in here, Jim." And he motioned to the wardrobe and I was a little slow about it, and Mr. Frank grabbed me and give me a shove and put me in the wardrobe and he shut the doors and told me to stay there until after they had gone and I just heard Miss Emma say: "Good morning Mr. Frank; are you alone?" and Mr. Frank said "Yes" and I couldn't hear them say nothing else, but I didn't know it was Miss Corinthia Hall until Mr. Frank spoke and said it was, but I heard Miss Emma's voice; they didn't stay there long until they were gone. I didn't hear them. The next move was Mr. Frank come and let me out of the wardrobe. I don't remember Miss Hall and Miss Clark using the telephone. If they did I didn't hear them and I didn't see them myself. I stayed in the wardrobe a pretty good while, for the whiskey and beer I had drank got me to sweating. I couldn't hear them talking only I heard Miss Emma say "Good morning." If they had been talking loud I could have heard them, but if they were talking low I couldn't. If they went up stairs Mr. Frank must have kept right behind them to see that they didn't take off anything. Then after awhile Mr. Frank he come into the office and pulled out one of those

round chairs from under the desk. The first thing he let me out of the wardrobe and I said: "I got too hot in there," and he said "Yes, I see you are sweating." When he opened the door I was fixing to step out and his eyes were looking larger than they usually look, and he jerked the door open and I was right there in front of the door, and then Mr. Frank said to me to sit down in a chair, in the one that turns all the way round, and when I sat down he told me to get up and shut the door; that was the door between his office and the stenographer's office; and I got up and shut it, and he said "Jim, can you write?" He was sitting down facing me and he brushed back his hair and I said "Yes, sir, I can write a little bit, Mr. Frank," and then he give me a pencil that he got off the top of his desk and there was nothing on it; he turned a sheet over for me to write and then he told me what to put on there and he told me to put on there: "Dear Mother: a long, tall, black negro did this by hisself." And when I went to put "negro" I put it "n-e-g-r-o-s" and he said: "Don't put no "s" there; he said that means negroes and he said now rub the "s" off and I rubbed the "s" out. He said: "It means just one person like yourself" and he told me to write it again and I written it and he looked at it and slapped me on the back and said "That's all right, old boy!" And he said "Write it again." And I written it for him three times. Then Mr. Frank reared back in his chair and asked me if I wanted to smoke and I told him "Yes, sir." And he taken out a cigarette for himself and handed me the box and he sort of turned round when he handed me the box and I taken out a cigarette and he handed me the box of matches and I taken out a cigarette and lit it and saw some money in the box and I handed the box of cigarettes back and he told me that was all right—to keep them, and I told him he had some money in the box and he said that was all right—I could have that. I taken it and stuck it in my pocket and then Mr. Frank looked around at me and held up his head towards the top of the house and said: "Why should I hang; I have wealthy

people in Brooklyn.'' I didn't know what he was talking about. I didn't have any idea in the world what he was talking about and he was winking and rubbing his hands together and touching me on the shank with his feet and took a deep breath. He said ''Why should I hang?'' and shook his head and rubbed his hands together. Then he asked me where was Snowball (Gordon Bailey) and I told him I didn't know, sir; and he asked me did I know the night watchman and I told him No, sir. I didn't know the night watchman personally. I just knew him by passing him, and he asked me if I had seen him in the basement at any time and I told him No, sir; that he would have to ask the fireman about that for he was down in the basement more than any of us was. And when I told Mr. Frank that, he stuck one finger in his mouth and said ''S-s-sh'' That's all right. And then Mr. Frank told me he was going to take that note I had written and send it off in a letter to his people when he wrote, and recommend me to them, because I was a good working negro around there, and he liked me, and when Mr. Frank said that, I said ''Don't take out another dollar for that watchman'' and he said ''All right, I won't.'' And he said ''I don't see why you want to buy a watch, because that big, fat wife of mine wanted me to buy her an automobile but I won't do that.'' I didn't say nothing about that for it didn't concern me and didn't seem to concern the subject he was talking about at first, and then Mr. Frank told me when he wrote that letter, he would not forget about me and he said ''Well, I will see you later about this,'' and I said ''All right, sir.'' And then he reached in his pocket and pulled out his watch and said ''It is nearly time for me to be going to dinner.'' But I didn't look at the watch. Then I asked Mr. Frank was that all he wanted with me right now and he said ''Yes.'' Then I asked him again ''Do you mean I can have what's in the box, sure enough, Mr. Frank?'' And he said ''Yes.'' But all the time though he was talking and jollying and going on with me, and I began to think it was something for a white man to be playing with a

negro, and during the time he cast his eyes up to the top of the house and said "Why should I hang; I have wealthy people in Brooklyn." I never did know where Mr. Frank's home was. I thought this was his home all the time. Then Mr. Frank said "I will see you Monday, if I live and nothing happens, James." And I said: "Well, is that all you want for good, Mr. Frank?" And he said "Yes." And I saw him go to his desk and take out a brownish looking scratch pad. The one I wrote on was white and was single ruled and I saw him take out a brownish looking one from his desk and he took his pencil and made a mark on it. I took it to be an "M" but he shut the tablet up and looked at me and told me that was all he wanted with me, and he come all the way to the top of the steps and he come three or four steps down to where he could see me, until I hit the sidewalk. It seems as if he was watching me to see if I would take anything as I went out, but there was nothing to take unless I took a great big box, but when I passed those two doors on the steps there, Mr. Frank told me to leave one of them open, and I taken a little piece of iron they have there, and pushed it against the door to keep it from shutting and went on out in the street, and I pulled the front doors to when I went out, and I went to the beer saloon across the street and opened the cigarette box and it had two paper dolars in there and two silver quarters, and I laughed and said: "Good luck has done struck me," and I bought a ten cent double header and then went back to Peters Street and hadn't none of the boys got there that I run with, and I walked up there to the moving picture show and looked at the pictures and they didn't seem to be any good, and I come back down Peters Street looking for that fellow I got the half pint of whiskey from, but I couldn't find him, and I struck out for home, and when I got home, it was about half past two o'clock, and I took the bucket and went to Joe Carr's at Mangum and Magnolia Street, and got fifteen cents worth of beer and come back home and sent the little girl to get a dime's worth of stove wood and a nickle's worth of pan

sausage and I eat half of the pan sausage up raw, and I give my old lady three dollars and fifty cents, and the other little change I kept it, and I laid down across the bed and there is where I stayed until about half past eight that night.''

Conley then continues to state in detail what he did the balance of the day and how he went again Monday and how he worked until Wednesday morning and how he happened to be arrested.

It will thus be observed that in this last statement Conley gives a great many details about what he did on Peters Street and that how he happened, in the course of his wanderings, to meet Mr. Frank on the corner of Forsyth and Nelson Streets; and that Frank then had him to follow him to the factory (this being Saturday, April 26th) and kept him concealed at the factory in the dark area on the first floor, near the elevator shaft; and he gives detailed accounts of several of the young ladies who entered and came out and their clothes, which corresponded in fact in some particulars with the clothes the evidence showed some of them wore and also gives the conversation between Darley and a certain Miss Smith which occurred at this place, which substantially was shown to have occurred. He tells about Holloway and a pegged legged negro coming up and down on this occasion and then about a lady with a green looking dress, who worked on the fourth floor; and finally he says Frank whistled for him to come up to the office, Frank trembling grabs him by the arm, carries him into the private office, and upon seeing two ladies come in—Miss Clark and Miss Hall—hides Conley in the wardrobe; that after the ladies left, Frank lets him out of the wardrobe sits him down in a chair and asks him could he write and that upon Conley saying Yes, he wrote a little bit, Frank gives

him a pencil and asked him to write: "Dear Mother: A long, tall, black negro did this by hisself." And when Conley puts down the word "negroes" Frank said: "Don't put the 's' there" and rubbed that out; that Frank had him write it again and he wrote it; and that Frank then slapped him on the back and said: "That's all right, old boy!" and then had him to write the note three times; that Frank then wanted him to smoke and he did so, and upon Conley seeing the money in the box, Frank told him to keep it; that Conley put the money in his pocket and Frank then said "Why should I hang; I have wealthy people in Brooklyn." That Conley didn't know what he was talking about; that Frank would keep rubbing his hands; that Frank then repeated the question as to knowing the night watchman and as to seeing him in the basement, and that when Conley said the fireman could tell him if the night watchman went to the basement, Frank put his finger to his mouth and said "S-s-sh! That's all right." That Frank then told him he was going to take the note Conley had written and send it off to his people and recommend Conley to them because he was a good working negro; and he says again in this statement that Frank repeated the language about not wanting to buy an automobile for his wife; and that Frank then said it was nearly time to go to dinner and that Frank repeated the language about hanging and wealthy relatives in Brooklyn; and that Frank then took out a brownish scratch pad and made a mark on it like "M;" that Conley left, and then proceeded to tell in detail the balance of his actions for that day.

It will be noted that there are many discrepancies and glaring conflicts between this affidavit and the two preceding statements, and among them is found a change of the day of writing the notes from Friday to Saturday.

The place where Frank met him and arranged to have the notes written is changed from the fourth floor of the factory on Friday to a place on Forsyth Street on Saturday. Conley in this affidavit still claims to know nothing of the crime. In fact he professes ignorance as to what Frank was talking about, but the most significant thing is his statement that in this affidavit he has made up his mind to tell the truth,—he had broken completely with Frank and no longer had any faith in Frank's helping him out.

CONLEY'S FOURTH STATEMENT.

Despite the fervor with which Frank was being pursued by the detectives and despite their willingness to believe anything which tended to incriminate him, the detectives were only half convinced of the truth of Conley's statement. There were still places which needed patching. There were still too many statements irreconcilable with the facts. It is inconceivable in this day and time that officers of the law, sworn to maintain the truth and seek it out, realizing as they must that Conley was unworthy of belief, persisted in extracting information from him which they hoped would fit and fasten the crime upon the helpless Frank. Startling as this charge may be, a careful perusal of the evidence of Pinkerton Detective Scott, (State's witness) found on pages 79, 80 and 81 of the evidence, sustains it, and no effort to deny or qualify this testimony of the state's witness can be found in the record. The result of another grilling by the detectives, produced Conley's fourth statement (his third affidavit) (Defendant's exhibit 39, p. 289 of the evidence). This affidavit was made on May 29, and is as follows:

"On Saturday, April 26th, 1913, when I come back to the Pencil Factory with Mr. Frank, I waited for him

down stairs like he told me, and when he whistled for me I went up stairs and he asked me if I wanted to make some money right quick and told him yes sir. And he told me that he had picked up a girl back there and had let her fall and that her head hit against something. He didn't know what it was, and for me to move her, and I hollowed and told him the girl was dead, and he told me to pick her up and bring her to the elevator and I told him I didn't have nothing to pick her up with and he told me to go and look by the cotton box there and get a piece of cloth, and I got a big, wide piece of cloth and come back there to the men's toilet where she was, and I tied her up, and I taken her and brought her up there to a little dressing room, carrying her on my right shoulder, and she got too heavy for me and she slipped off of my shoulder and fell on the floor right there at the dressing room and I hollored for Mr. Frank to come there and help me, that she was too heavy for me, and Mr. Frank come down there and told me to pick her up—Damn fool, and he run down there to me and he was excited, and he picked her up by the feet, her head was sticking out of the cloth and then we brought her on to the elevator, Mr. Frank carrying her by the feet and me by the shoulders, and we brought her to the elevator and then Mr. Frank says: "Wait, let me get the key"—and he went into the office and got the key and come back and unlocked the elevator door and started the elevator down. Mr. Frank turned it on, himself, and we went on down to the basement and Mr. Frank helped me to take her off the elevator and he told me to take it back there to the saw dust pile, and I picked it up and put it on my shoulder again and Mr. Frank, he went up the ladder, and watched the trap door to see if anybody was coming, and I taken her back there and taken the cloth from around her and taken her hat and shoe which I had picked up upstairs, right where her body was lying, and brought them down and untied the cloth and brought them back and throwed them down on the trash pile in front of the furnace, and Mr. Frank was standing at the trap door at the head of

the ladder. He didn't tell me where to put the things. I laid her body down with her head toward the elevator, lying on the stomach, and the left side of her face was on the ground and the right side of her face was up, and both arms were laying down with her body, by the side of her body. Mr. Frank joined me back on the first floor; I stepped on the elevator and he stepped on the elevator, when it got to where he was, and he said: "Gee! that was a tiresome job!" and I told him his job was not so tiresome as mine was because I had to tote it all the way from where she was lying to the dressing room, and in the basement from the elevator to where I left her. Then Mr. Frank hops off the elevator before it gets even with the second floor and he makes a stumble and he hits the floor and catches with both hands and he went on round to the sink to wash his hands and I went and cut off the motor and I stood and waited for Mr. Frank to come from around there washing his hands and then we went on into the office and Mr. Frank he couldn't hardly keep still; he was all the time moving about from one office to the other; then he come back into the stenographer's office and come back and he told me 'Here comes Emma Clark and Corinthia Hall" I understood him to say and he come back and told me to come here and he opened the wardrobe and told me to get in there and I was so slow about it he told me to hurry up, damn it, and Mr. Frank,—whoever that was come in the office,—they didn't stay so very long, till Mr. Frank was gone about 7 or 8 minutes; and I was still in the wardrobe and he never had come to let me out and Mr. Frank come back and I said: "Goodness alive! You kept me in there a mighty long time!" and he said "Yes, I see I did, you are sweating;" and then me and Mr. Frank set down in a chair. Mr. Frank then took out a cigarette and give me the box and asked me did I want to smoke and I told him "Yes, sir;" and I taken the box and taken out a cigarette and he handed me a box of matches and I handed him the matches back and I handed him the cigarette box and he told me that was all right, I could keep that; and I told

him he had some money in it and he told me that was all right; I could keep that; and Mr. Frank then asked me to write a few lines on that paper, a white scratch pad he had there, and he told me what to put on there, and I asked him what he was going to do with it and he told me to just go ahead and write, and then after I got through writing, Mr. Frank looked at it and said it was all right, and Mr. Frank looked up at the top of the house and said: "Why should I hang; I have wealthy people in Brooklyn." And I asked him what about me and he told me that was all right about me; for me to keep my mouth shut and he would make every thing all right, and then I asked him where was the money he said he was going to give me and Mr. Frank said: "Here is two hundred dollars" and he handed me a big roll of green back money and I didn't count it; I stood there a little while looking at it in my hand and I told Mr. Frank not to take another dollar for that watchman I owed and he said he wouldn't, and the rest is just like I have told it before.

The reason I have not told this before is I thought Mr. Frank would get out and help me out, but it seems he is not going to get out and I have decided to tell the whole truth about this matter.

While I was looking at the money in my hands, Mr. Frank said: "Let me have that and I will make it all right with you Monday if I live and nothing happens" and he took the money back and I asked him if that was the way he done and he said he would give it back Monday."

In this third affidavit Conley gives the lie to practically all of his former statements and his various detail doings on Peters Street; he gives the lie to that part of his second affidavit (his third statement), wherein he stated that he knew nothing of the cause of the writing of the notes and left immediately after writing them. He admits in this last statement to have helped dispose of the body; to have gone back to the metal room and to

have found the body lying at a place in the west end of it and to have carried the body, under Frank's direction, towards the elevator; to have dropped it once in front of the dressing room; that he and Frank then carried the body to the elevator; that Frank ran the elevator down to the basement and that he, Conley, carried the body back to the place where Newt Lee found it next morning. He states that the writing of the notes occurred after the disposition of the body. Boldly he states that his reason for making this last statement is that he "thought Mr. Frank would help him out, but it seems as if Frank is not now going to get out and he, (Conley) has decided to tell the whole truth." He makes this statement as if his former statements would possibly have left Frank with any chance of escape. A most unbelievable occurrence is made the finale of this affidavit. Conley states that Frank gave him a big roll of greenbacks, telling him it was $200. and that just as they were about to part, and as Conley was looking at the money in his hands, Frank took it back from him, stating "let me have it and I will make it all right with you Monday," upon which Conley retorted "If that was the way he done when he said he would give it back Monday."

A close study of these four statements, three of which are under oath, shows that their author has no regard for the truth. With no remorse, with no shame he changes time, incident, and facts to suit the pleasure of those for whom they were made. In reason can any man, judging others as he would be judged, entertain doubt that the negro Conley, with the first law of nature, self-preservation, as his motive, readily and willingly prostituted his oath and heaped lie upon lie upon this helpless defendant, in an effort to placate his auditory—supplying them such ammunition worth-

less as it is in the sight of God, and as it ought to be in the sight of man?

DETECTIVE SCOTT TELLS THE METHODS BY WHICH CONLEY'S FOUR STATEMENTS WERE OBTAINED.

It is not left to our imagination to picture the drama of Conley and the detectives. We are not forced to the obvious conclusion upon reading these four statements that Conley was receiving suggestions. Equalled only in its sinister effect by the treatment accorded Minola McKnight is this tutoring of Conley, which the testimony of Pinkerton detective Scott portrays. Scott makes the following statement in reference to the methods pursued by Black and himself to get the affidavits out of Conley:

"That on May 18, Conley in his first statement said he didn't go to the factory at all, the day of the murder. (See evidence of Scott, page 80); that on May 18, Scott having found out he could write, dictated to him the words: "that long, tall, black negro did it by hisself," and that it took Conley more than six or seven minutes to write those words, and that he wrote them slowly." (Scott, page 80); that when Conley, on May 18, denied that he had any connection with the murder and was not at the factory that day, Scott and Black talked very strong to him. They tried to get a confession; they used profanity on him and cussed him and worked and picked on him that Sunday. (See cross-examination of Scott, page 81). That Conley looked Scott straight in the face and denied any knowledge of the murder that day; that the detectives worked with him two hours; that they had another conversation with him May 24th and made a stenographic report of it; that they carried him to Solicitor-General Dorsey's office and went over that

statement of May 24th with Dorsey; that Conley still denied that he saw the little girl or knew anything of the murder. (Cross-examination of Scott, page 81).

When Conley said that he wrote the notes on Friday, he claimed to be telling the whole truth and had sent for Scott and Black voluntarily, this being on the 24th (Scott, page 81); that on May 25th, Scott and Black again called on Conley and questioned him three hours and tried to get him to add to it, to confirm the statement he had already made; that he declined to give anything further, and that on the 27th, the detectives saw him again in Chief Lanford's office and talked with him five or six hours and tried to impress on him that Frank would not have written the notes on Friday; that it was not a reasonable story; that this statement would not fit and that the detectives wanted another statement and at that time Conley declined to make another statement, saying he had already told the truth (Cross-examination, Scott, page 81); that on May 29th, Chief Lanford and Scott had another talk with Conley and grilled him five or six hours, staying with him most of the day; that they pointed out to Conley that his statements would not do, would not fit. Conley said he had no other statement to make; that he had already told the whole truth. **The detectives pointed out that the writing of the notes on Friday would not be accepted and would not do**, and thereupon Conley put it on Saturday instead of Friday. (See evidence of Scott, page 81). Conley then said he was going to make his last statement; that he had fully thought over it and had made up his mind to tell the whole truth, and thereupon he made the statement of that date which has been alluded to. (See evidence of Scott, page 81). In that statement Conley said nothing about seeing Monteen Stover or Lemmie Quinn, and said he didn't see Mary Phagan

and that the only parties he saw while waiting in the area were Miss Smith, Darley, Holloway, a pegged legged negro and a woman in a green dress; and he didn't even claim to have seen Lemmie Quinn or Mrs. White. (See cross-examination, Scott, page 81). **Scott, further on, said that he and the other detectives pointed out things in Conley's story that were improbable; and told Conley he must do better; that they would look over the story and anything that was out of place in it, they would tell him it wouldn't do, that it wasn't true, and they stayed with him until 6 P. M.**, which led up to the statement of May 29. (Scott, page 81). And in this statement of May 29th, Conley said nothing about Frank asking him to watch for him or about closing any doors; and again in this statement of May 29th, denied seeing Monteen Stover or Mary Phagan and denied knowing anything about the mesh bag or about the parasol, and said nothing about writing two or four notes. (See Scott, page 81). Scott finally said: "**It would be impossible almost to state the number of matters that I told Conley didn't fit the last time, unless I had the statement clear in my mind. Yes I would say; 'this doesn't fit, Conley'—and then Conley would get up something that would fit.**" (See Scott, page 82).

CONLEY'S TESTIMONY ON TRIAL BELOW AND WHEREIN IT DIFFERS FROM HIS FORMER STATEMENTS.

Conley's testimony as delivered on the stand was even radically different from his testimony as given in his affidavit of May 28th and May 29th. The defendant having come into court prepared to meet Conley's evi-

dence as contained in these affidavits, Conley made a statement that bore very little resemblance to it, as will be shown.

Conley claimed on the stand that he had frequently watched for Frank before in the factory while Frank had women there—giving a number of occasions. He claimed he would watch at the downstairs door and would, by a system of signals, notify Frank of the presence of anybody. He claimed that a man named Dalton had come in on several occasions, with a woman named Daisy Hopkins; he claimed that on two occasions he had seen Frank in the act of having unnatural relations with women; he claimed that on Friday evening, April 25, 1913, about three o'clock, on the fourth floor of the factory, Frank asked him to come to the factory at about 8:30 Saturday morning and that he came. (See page 52, Brief of Evidence). In his previous statement he had said that he met Frank by chance on Forsyth Street Saturday morning and followed Frank to the factory at Frank's request, and never mentioned previous watching. (See Evidence of Scott, page 81). In his testimony at the trial he claimed that he got to the pencil factory at 8:30 Saturday morning and remained there practically all the morning. (See page 53). In his previous statements he gave written detailed accounts of what he had done on Peters Street, such as drinking, playing dice, winning money and the like. In his testimony on the trial he claimed Frank met him at 8:30 and he explained that he had previously watched for Mr. Frank while young ladies would be on the second floor, giving revolting accounts of what he claimed to have seen between Frank and these women. In his previous statement he had never mentioned anything of this sort. (See testimony of Scott, page 81, to the effect that in his previous statement he

had said nothing about Frank asking him to watch or closing the doors.) In his testimony on the trial, he said the only time he left the factory that morning was to go to the Capital City Laundry and come right back, whereas in his previous testimony he gave long accounts of his wanderings on Peters Street on this morning. In his testimony below he claimed that coming back from the Laundry he saw Frank on Forsyth Street and spoke to him and that Frank struck up against a man's baby carriage. Nothing of this sort was ever mentioned in his previous statements. In his testimony at the trial he claimed that his watching on this occasion was like he had watched on other occasions and in his previous statement had never mentioned watching on other occasions.

In his testimony at the trial below he says that when he got back to the factory from the laundry that Frank told him that there would be a young lady up there after a while and that Frank was going to chat with her and that when the young lady came he would stamp. Nothing like this was ever hinted at in his previous statement. In his testimony at the trial below he said that when Frank stamped, he was to shut the door and that Frank told him when he whistled he would be through and that he could then unlock the door and come up to the office. Nothing like this was mentioned in his previous statements. In his testimony at the trial below he said that Frank told him not under any conditions to let Darley see him. Nothing like this was ever mentioned in his previous statements. In his testimony at the trial below he said he saw Mr. Quinn go upstairs. (See page 54). In his statements this was not mentioned and Scott says that in none of his talks did he ever mention seeing Quinn. (See Scott, page 81).

Conley said he saw the girl who is dead go upstairs

after Quinn came down. He stated that he did not know the girl's name, but thought it was "Miss Mary Perkins." In his statements he had never hinted at this and he had **always referred to the murdered girl as Mary Phagan,** and Scott said he had always denied seeing Mary Phagan up to the time when he finally admitted seeing her dead body. (See Scott, page 81). In this connection, practically all the circumstances of perjury are admitted by Conley as will be seen by part of his cross-examination on pages 66 to 71, inclusive.

Conley testified at the trial below that after the deceased went upstairs, he heard her steps going back toward the office and then heard two people walk out of the office, back towards the metal department; that he then heard a lady scream. He had never hinted of this in his previous sworn statements.

He testified at the trial below that the next person he saw coming up was Monteen Stover. (See page 54). In his previous statements this had never been said and he denied ever seeing her. (See Scott, page 81).

He then testified that he saw Monteen Stover coming down the steps, which was never hinted at in his statements. He then testified at the trial below that he heard somebody from the metal department come running back upstairs and then heard somebody tip-toeing to the metal department, and after this, dozed off and went to sleep. (See page 54). Nothing of this sort had been hinted at in his previous statement.

He testified below that the next thing he knew was a stamping over his head and that he then went and locked the door and then Frank whistled; this had never been stated before.

He then testified that when he went up to the top of the steps Frank had a little rope in his hand and that

Frank asked him if he saw a little girl who passed a while ago and Conley replied that he saw one go up and come down and that another one went up and didn't come back down and Frank said, "Well that one that didn't come back, she came into my office a while ago and he went back to see if the little girl's work had come and he wanted to be with the little girl and she refused him and he struck her and he guessed he struck her too hard, and she fell and hit her head against something" and that Frank then told him: "You know, I aint built like other men." (See page 55). Not a word of this evidence was hinted at in any of Conley's previous statements. (See Scott, page 81).

Conley testified at the trial below that the reason Frank said he wasn't built like other men was that he had seen him in an unnatural position with women. (See page 55). Not a word of this was hinted at in the written affidavits. (See Scott, page 81).

Conley testified at the trial below that he had helped Frank dispose of the body and his account of disposing of the body in his evidence differs in many particulars from his previous, sworn, written statements. He testified below that he found the cloth tied around her neck and the rope around her neck; he had never mentioned this in his previous statements.

He testified at the trial below that it was four minutes to one o'clock when he came to the body and began the task of moving it). It will be remembered that in his first affidavit, his second statement, he said it was four minutes to one on Friday when Frank first called him.)

The contradictions between his account of moving the body, in his testimony and in his previous statements are too numerous to mention. He states again at the trial below about writing the note and also tells again about hid-

ing in the wardrobe and about Emma Clark and Corinthia Hall coming in and also about the roll of green backs and Frank taking them back, and about Frank saying: "Why should I hang?"

He testified at the trial below that after getting back to the office, Frank told him to go back into the basement and burn the body; this had never been mentioned in his previous statements.

He testified at the trial below that Frank asked him could he come back this evening and do it (meaning to burn the body and get his money), and that he promised to be back in forty minutes, but he claims he went out and never came back. Nothing of this sort was mentioned in his previous statements.

CONLEY'S ADMISSIONS TO HIS VARIOUS FALSE STATEMENTS.

Conley's admissions to his various false statements are too numerous to detail. He admitted lying in his first statement about going to Peters Street, and various detailed things he had done there. (See cross-examination, pages 67-73.) He said that when he would lie to Scott and Black he would hold his head down. (Evidence, pp. 66-73). Conley admits lying about the time he came to the factory; said he didn't want to put himself there. (Evidence, pages 66-73). Says that he told the lies at first because he didn't want to give it away. (Evidence, pages 66-73). Admits that he told the officers about the incident of Frank running into the baby carriage on Forsyth Street after he left the jail. (Evidence, pages 66-73). Admits that he didn't tell the truth at first about watching for Frank. (Evidence, pages 66-73). Says he first told this to Starnes and Campbell. (Evidence, pages 66-

73). Admits making false statements about Mattie Smith and Darley and corrected the mistake, after he got out of jail, with Starnes and Campbell and Solicitor Dorsey. He admits he made so many misstatements that he cannot count them. (Evidence, pp. 66, 69, 73). He admits that he did not mention Quinn, Mary Phagan or Stover going up stairs in his previous statements because they might have accused him of the crime. (Evidence, pages 66 and 71). He admits that after the last statement of May 29th was made, that he came to the Solicitor's office three times and Solicitor Dorsey came to headquarters four times, and said he added to his story every time Mr. Dorsey came back. (See evidence, pages 69 and 73).

Conley claims that he never told about hearing Mary Phagan scream until after he got out of jail into the station house and after the previous statements were made, when he told it to Starnes and Campbell. (Evidence, pages 71-73.)

Conley admits he never told about any person tip-toeing to the metal room until after he got out of jail and in the station house. He admits that when he made his confessions to Scott and Black, he told nothing about Frank having the cords in his hands at the top of the stairs and that he couldn't get it in his mind to tell it. (Evidence, pages 71-73).

Conley in his direct examination and in his cross-examination had never mentioned the little girl's purse or mesh bag. In his direct examination he went exhaustively into all the transaction from beginning to end. Finally on the rebuttal examination Mr. Dorsey asked him what became of the mesh bag and he said he saw it on Frank's desk after the notes were written. (See evidence, pages 66-73). He had never mentioned this be-

fore in any of his written statements or in any of his previous testimony in the case.

Conley testified below that the moving of the body began about four minutes to one and that he, Conley, left the factory at 1:30, leaving Mr. Frank at the factory.

In this connection, and to digress a moment, we will state that Conley went through with the police officers his motions just as he claims to have done with Frank in disposing of the body and that Mr. Harlee Branch who witnessed the performance, testified that it took about 64 minutes. (Brief of Evidence, page 140). Dr. Owens and a number of gentlemen had written off from Conley's evidence a detailed statement of what he did with the body and these gentlemen having gone through the performance, Dr. Owens testified that it took not less than 36½ minutes. (Record, page 145).

TIME OF GIRL'S DEATH.

The State tried to show by Dr. H. F. Harris, from specimen of cabbage taken at post mortem from the girl's stomach, and the extent to which it had been digested, that the girl ceased digesting the cabbage, either from unconsciousness or death, within from one-half to three-quarters of an hour afer eating the cabbage. (See evidence of Dr. H. F. Harris, page 48).

This opinion of Dr. Harris was shown by a number of physicians to have been the wildest speculation, some of the physicians characterizing it as the wildest kind of guess work, and giving it as their opinion that cabbage, such as was found in the girl's stomach unmasticated as it was, could well have been there two or more hours after eating, at the time she met her death, or became unconscious. (See evidence of Dr. Olmstead, page 161, Dr.

Hancock, page 157; Dr. Childs, page 165; Dr. Kendrick, page 162; Dr. Bachman, page 155; Dr. Westmoreland, page 159).

From the above testimony it will be thus noted that the physicians differ widely as to whether the partially digested cabbage found in the stomach gave any indication of the time of death. The fact that the negro, Conley, was in hiding on the first floor of the factory between the hour of twelve and one with an opportunity of killing the girl as she came down the steps from Frank's office makes the testimony of the physicians as to the time of death of little or no importance.

Whoever killed the girl, probably did so between the hours of twelve and one o'clock.

DOCTORS DIFFER AS TO SIGNS OF VIOLENCE.

Dr. J. W. Hurt, who has heretofore been quoted, and who made an examination of the girl the day after the tragedy, saw no signs of an attempt to rape. He did see signs that the girl's menstruation was on. It was shown that violence such as a blow on the head might bring on menstruation, even if occurring a few days after the flow had ceased.

Dr. Harris performed an autopsy a number of days after death and went into the skull. He claimed that there was an injury to the brain or meninges, and that in his opinion the blow on the head produced unconsciousness. (See evidence of Dr. Harris, page 48).

A number of other physicians testified that while it was possible for the blow to produce unconsciousness, it was just as possible that it did not produce unconsciousness. Dr. Harris stands practically alone in the Record in this opinion. (See evidence of Dr. Westmoreland,

page 159, Dr. Olmstead, page 161; Dr. Hancock, page 158; Dr. Childs, page 165; Dr. Kendrick, page 162).

Dr. Harris also made a microscopic examination of a small section of the vagina which he had cut from it at the post mortem, and he claimed to have found the blood vessels which can only be seen, the microscope showed some extravasation of blood therefrom. He gave it as his opinion that perhaps this indicated some kind of violence to the parts, although he would give no definite opinion as to what kind of violence, and he expressed no opinion as to whether the girl had had any intercourse with a man, and said that the failure to find spermatazoa was no evidence one way or the other. (See evidence of Dr. Harris, page 48).

On the other hand a number of physicians, including Drs. Kendrick, Olmstead, Hancock and Westmoreland, testified that an unusual distention of the blood vessels in the wall of the vagina might well exist from the presence of the girl's monthly sickness, that the separation of the wall from the vagina meant nothing and could have been caused after death by the post mortem itself or by the insertion of the fingers in making the digital examintion. (See evidence of Dr. Olmstead, page 162; Hancock, page 158 and Westmoreland, page 159).

The physicians last named give it as their opinion that the facts stated by Dr. Harris indicate nothing whatever as to violence and agreed with the State's first witness, Dr. Hurt, that there was no evidence of violence before death.

FRANK'S PERSON, CLOTHING AND PRIVATES EXAMINED BY DETECTIVES.

On the Monday following the murder, Frank's person and privates were examined by detectives. No bruises

or signs of violence were found. On that same day at Frank's request, detectives went to his house and there examined his linen and clothing. Not a trace of blood was found.

(The Statement of Frank, page 210, Evidence of Black page 19; Evidence of February, page 41).

REWARD OF ABOUT $4,300.00.

As explanatory of the conduct of various of these witnesses, notably Barrett, and the employers of the negro, Albert McKnight, who evidently sought to get him to influence his wife's testimony, it came out that there was a reward of something like $4,300.00 offered for the conviction of the murderer. The witness, Barrett seemed firmly of the belief that he would get this reward, and the reward probably accounts for a good deal of the remarkable testimony on the case. (See Evidence of Henry Smith, page 137).

ELEVATOR FOUND UNLOCKED SUNDAY MORNING.

It was shown by Holloway the watchman, that when he sawed some lumber on Saturday, he opened the motor which ran the elevator and operated the saw and that he did not again lock the motor. This explains fully the fact that the elevator was not locked and refutes the statement of Conley that Frank went to the office to get the key which unlocked the motor box.

NOBODY IN THE BUILDING HEARD THE ELEVATOR RUN ON SATURDAY.

Neither Denham nor White heard the elevator running on Saturday. (See evidence of Denham, page 108). A number of witnesses testified that the running of the

elevator caused considerable noise which was audible throughout the factory, especially on the fourth floor where the wheels were located. As the elevator was started and stopped, it could be distinctly heard. (See evidence of Denham, page 108; Finlay, page 142; Darley, page 135; Schiff, page 92; Miss Rebecca Carson, page 117; Miss Dora Small, page 120; Pride, page 134).

FACTS BEARING ON FRANK'S PLANNING FRIDAY TO COMMIT CRIME.

Conley testified that at 3 o'clock Friday Frank came to him when he was working on the fourth floor and requested him to come back on Saturday morning and watch for him, and further stated that this was done in the presence of Gordon Bailey. This was denied by Gordon Bailey. (See Evidence of Bailey, page 136).

Helen Ferguson claimed that on Friday evening about 6 P. M. she asked Frank for Mary Phagan's pay envelope, and Frank declined to give it to her. (See evidence of Ferguson, page 142). Disputing the testimony of this witness, Schiff swears that he was paying off Friday, and that he paid Helen Ferguson, and that Frank had nothing to do with paying off employees on Friday, April 25th. (See evidence of Schiff, page 87). In further dispute with witness Ferguson, Magnolia Kennedy states that she and Helen Ferguson were together when they received their pay; that they received it from Schiff who was paying off and that Helen Ferguson did not go into Frank's office but left the building with her. (See evidence of Magnolia Kennedy, page 104). The proof also showed that unless employees were related or unless one employee had an order from another employee, it was not the custom for one employee to draw another employee's pay. (See evidence of Schiff, page 87).

But even Helen Ferguson does not claim that she gave Frank any intimation that Mary Phagan was coming for her pay on Saturday.

Indeed, Saturday April 26th was a holiday, Memorial Day, and it was more than probable that those who did not draw their pay on Friday would expect the factory to be closed on Saturday, and would get their pay on the following Monday. It was abundantly testified that signs were posted in the factory during the week beginning Monday, April 21st, setting forth that Saturday was a holiday, that the factory would be closed and that employees would receive their pay on Friday, April 25th. (See evidence of Schiff, page 87, and Holloway, page 31).

At three o'clock Friday when Conley claims Frank made the arrangement for him to come back Saturday, Frank did not even know that Mary Phagan would not come for her pay Friday, and it would have been the wildest guess that if she did not come Friday that she would come on Saturday, rather than Monday or any other day.

MARY PHAGAN HAD NO IMPROPER RELATIONS WITH FRANK.

There is not the slightest pretence that Mary Phagan had any improper relations with Frank, or that she had ever given him any encouragement, or that he had the slightest reason to believe that he could be criminally intimate with her.

Not a line of the Record shows them to have been together at any improper time or place. Not a line in the Record shows that Frank ever said anything out of the way to her, or made any improper advances to her, and

not a line in the Record (even taking the strained view of the weak and uncertain witnesses put up by the State) shows that Frank did anything to Mary Phagan more than to give directions about her work, how she should do her work and what she should do in the most open and business-like way.

NO EVIDENCE THAT FRANK KNEW THAT MARY PHAGAN WAS COMING OR HAD ANY APPOINTMENT WITH HER, APPEARS IN THE RECORD.

We respectfully submit that it has been demonstrated that there is not the slightest pretence that, at the time 3 P. M. Friday, when Conley claims that Frank told him to come back Saturday, Frank in his wildest moments, could not have imagined that Mary Phagan, any more than any other person in the world, would come to the factory on Saturday; nor is there the slightest pretence that Frank knew the time she would come, in the event that she was coming on Saturday; or that Frank knew how many other persons would be in the factory at any given moment on Saturday.

ABSURDITY OF CONLEY'S STORY TO BEGIN WITH.

Therefore, Conley's story at the beginning is wild and unreasonable. Frank asked him to come back Saturday when there was no person to watch for, when there was no arrangement to meet anybody, and when the office of the factory would likely be full of people.

FRANK CONCEALED NOTHING FROM THE BEGINNING.

The evidence shows that from the very beginning Frank answered every question asked him, concealing nothing. He said at once that he paid off Mary Phagan Saturday. He made the police a full statement on Tuesday after the tragedy. In the following week, at the Coroner's inquest he submitted himself to a full and thorough examination and no conflict of any materality appears between any of these statements and his statement on the trial. If there had, the State would have shown it.

It is true that the State charges that Frank made a statement at police headquarters to the effect that he left the factory on Saturday, at 1:10 P. M. as shown by State's exhibit B. It will be observed that this exhibit purports to be a statement made to detectives at police headquarters on Monday morning, the statement being taken down in shorthand by police stenographer, G. C. February, and afterwards transcribed by him. It will be observed (and we say this is a very strange circumstance) that this statement was never submitted to Frank, is unsigned and unsworn to, and we contend that it can in no way over-ride the testimony of the various witnesses who saw Frank from the time he left the factory at one o'clock until he took his lunch on that day.

CONLEY'S STATEMENT FIXED UP TO FIT ADMITTED FACTS.

That Conley was fully cognizant of all that transpired in the case, there can be no doubt. We have shown that he read the newspapers, dealing with the crime, con-

stantly. (See evidence of Campbell, page 106; Fuss, page 121; Small, page 120; Bailey, page 136).

The place in the metal room where the alleged blood spots were found, was in plain view for the reason that portions of the floor had been chipped up.

Conley was confronted at the station house with witness Dalton. He knew that Dalton claimed to have visited the factory and accordingly made his evidence to fit in with Dalton's by saying that he let Dalton into the factory on occasions.

Conley states that Mary Phagan arrived at the factory before Monteen Stover so as to make his evidence fit in with the State's theory that when Monteen Stover was on the second floor of the factory in Frank's office, Mary Phagan was being murdered in the metal room, and also to make his evidence dove-tail with the claim of the State that perhaps the street car on which Mary Phagan came to town was ahead of schedule. Conley also mentions seeing various parties in the factory at given times only after it was generally known that these parties had been in the factory at such times by the publicity given to Frank's statement and the testimony of these witnesses before the Coroner.

PHYSICAL FACTS OF THE CASE WHICH SHOW CONLEY'S EVIDENCE TO BE FALSE.

Conley's evidence embraces two periods of time. The first period may be said to be from twelve o'clock to four minutes to one. This is the period when Conley claims he was watching for Frank in the area around the stairway on first floor and during which time various people, including Mary Phagan went upstairs. The second period that Conley gives extends from four minutes to one

o'clock to half past one, when he claims the body was being removed and the notes being written.

During the first period the physical facts show that Conley could not have told the truth.

At two minutes past twelve Miss Hall leaves.

At five minutes past twelve Monteen Stover arrives and stays until ten minutes past twelve. During the time that Monteen Stover was on the second floor of the factory she states: "The factory was still and quiet while I was there." (See Evidence, page 26).

At 12:11 or 12:12, according to the undisputed evidence, as we have shown, Mary Phagan arrives. She could not have arrived before Monteen Stover according to any version of the case. If she arrived between 12:02 and 12:05, she would have met Miss Hall or Monteen Stover, because it would have taken some time for Miss Hall to get out and for Mary Phagan to enter, go up stairs, go into Frank's office and then come out, go back to the metal room, and for all to transpire that Conley claimed happened. It is as certain as anything can be from human evidence that Mary Phagan never got to the factory until Monteen Stover had left. This annihilates Conley's testimony.

Quinn comes in and talks with Frank at 12:20.

Mrs. White sees him again at 12:30 and White and Denham see him at 12:50.

Therefore, in order to believe Conley's testimony as to the period of time between twelve and one o'clock, we must discredit the testimony of Miss Hall, Motorman Matthews, Conductor Hollis, and State's witness, George Epps, none of whom were in any way impeached, and must even to the extent of disbelieving the testimony of the dead girl's mother, Mrs. Coleman, who testified to

her leaving home in time to catch the ten minutes to twelve Bellwood car.

As to the second period of time, to-wit: from 12:56 to 1:30 Conley's evidence is contrary to the physical facts that Frank was seen catching the car at the corner of Whitehall and Alabama Sts. at 1:10 as testified to by Miss Kern; that he got off the car on Georgia Avenue at his home at 1:20, as testified to by Mrs. Levy and Mrs. Selig and Mr. Selig and Minola McKnight; that he was even seen at his home at 1:30 by the State's witness, Albert McKnight, and that he was on Washington St., ready to board the car at 1:55, as testified to by Mrs. Michael, Loeb, and the various other witnesses, heretofore mentioned.

Conley is contradicted by the physical fact that there was no blood where he claimed the body of the girl was lying in the metal room, as is admitted by all of the witnesses.

Conley's testimony as to his carrying the body on his shoulder in the basement is contradicted by the testimony of policemen Dobbs and Lassiter, who testified to the physical fact that there was a mark on the ground of the body being dragged from the elevator shaft to where it lay. (See evidence of Dobbs, page 9, and Lassiter, page 43).

OTHER PALPABLE FALSEHOODS OF CONLEY.

Conley is contradicted by Gordon Bailey that Frank made an appointment with Conley on the fourth floor on Friday. (See evidence of Bailey, page 136).

Conley, in stating that when Frank had him come into his office Frank asked him if he could write is contradicted by his own evidence that he had frequently

written notes to Frank, and Frank knew he could write. (See evidence of Conley, page 73).

Conley's evidence that after the body was moved on the elevator from the second floor to the basement, the switch box was locked, is contradicted by all the witnesses, who found it unlocked on Sunday morning. (See evidence of Darley, page 32; Rogers, page 13).

Conley's evidence that the elevator was moved on Saturday in taking the body from the second floor to the basement is contradicted by the fact that none of the employees in the building at the time heard the elevator running and by the testimony of Conley himself. Conley swore at the trial that, early Saturday morning about 9 A. M. he had eased his bowels in the elevator shaft (see evidence of Conley, page 72); and that the elevator came down to the ground in the basement when the body was taken off. Yet this excrement was found unmashed in the bottom of the shaft by the witnesses who entered the basement early Sunday and subsequently on Sunday morning the elevator descending to the basement mashed it. (See testimony of Rogers, page 15; Lassiter, page 43). Conley's evidence that the elevator was moved on Saturday is further contradicted by the testimony of State's witness, Policeman Lassiter, who swore that early Sunday morning before the elevator had been lowered, he found a new ball of twine in the bottom of the elevator shaft unmashed. (See evidence of Lassiter, page 43).

Conley, in claiming that he wrote the note at Frank's dictation to give an explanation of how the murder occurred, contradicts his own evidence that at the very time the notes were written Frank had told him to burn the body. If the notes were to be written and left with the body, then, of course, it was not to be burned. If the body was to be moved and burned, then the presence of

the notes might themselves indicate the crime. The two acts are inconsistent.

Conley is contradicted by the notes themselves which show that they originated in the brain of an ignorant negro, and that their language could never have been spoken or dictated or even entered the mind of a man who has spent most of his life in the North like the defendant in this case.

Conley's testimony that he watched on other occasions for Frank is contradicted by Schiff, p. 86; Bauer, page 135; Gottheimer, page 124; Holloway, page 76; Montag, page 129; Darley, pages 75 and 76; Arthur Pride, page 134; McCrary, page 131; Payne, page 131; Nix, page 131; Bailey, page 136; Weinkauf, page 133. In fact the only part of Conley's testimony which had the shadow of corroboration was that statement in his testimony that he admitted C. B. Dalton to the factory, and what a corroboration this is! Corroboration by a man impeached by the nature of his own testimony, as well as by fifteen witnesses, all of which has been referred to heretofore.

CONLEY'S EVIDENCE SHOWN TO BE FALSE BY ALL CIRCUMSTANCES OF THE CASE.

It seems superfluous to argue the falsity of a man's testimony who admitted as many false statements as Conley did; but we wish to leave no doubt as to his entire tale being a fabrication as far as Frank is concerned.

Conley swears that he was put by Frank into the basement to watch the door, and yet, after Mary Phagan went up stairs and he heard Frank take her back to the metal room and heard Mary Phagan scream, he lets in Monteen Stover, allows her to go upstairs and go right

upon the scene of the alleged assault. (See Conley, page 54). This shows his whole story of watching to be a fabrication.

Conley says that after the girl screamed and after she had evidently been killed, Frank stamped his foot for him to lock the front door, and he accordingly locked the front door, and in a few minutes Frank stamped for him to unlock the door and Conley accordingly unlocked it and went upstairs and helped carry the body through the corridors and to the elevator. Doesn't the absurdity of Frank having Conley unlock the door when the body was about to be moved, become apparent to everyone? With the body about to be moved, Frank, according to this statement, requires Conley to unlock the front door and let anybody in who might wish to come in and see the moving of the body. (See Conley, page 55).

CONLEY'S TESTIMONY AS TO WATCHING ON PREVIOUS OCCASIONS ABSURD.

It was shown that the front door which Conley claims he watched at was, prior to January, 1913, and at the times when Conley claims he watched, as much the entrance of the Clarke Woodenware Company—who used practically all of the ground floor, as it was that of the National Pencil Company; and neither Frank nor Conley could have had any control of the door or locked anybody out or prevented the admission of anybody. (See Schiff, page 57; Darley, page 38).

What was the need for watching if Frank could control the door and have it locked? Why not lock it and dispense with taking a watchman into his confidence? As a watchman, whom could this negro Conley have stopped at the door?

It is perfectly obvious that the testimony as to Conley's watching is brought in by him in order to explain his own presence there on this occasion and in order to enable him to bring in his false testimony as to perversion on previous occasions and thus create a prejudice against Frank, and at the same time save his guilty neck from the noose.

OTHER PALPABLE FALSITIES IN CONLEY'S EVIDENCE.

We have already shown that Conley swore when Frank called him in as to the notes, that his first question was: "Can you write?" And that Conley informed him that he could, whereas, according to Conley's own evidence and the undisputed testimony in the case, Conley had written numerous notes to Frank about watches in pawn and had also kept a record of goods on the fourth floor and had turned in reports to Frank in his own handwriting.

Conley says that when the notes were being written in Frank's office, Frank said:"Why should I hang; I have wealthy relatives in Brooklyn." It was shown that Conley had been reading the newspapers and that it there appeared that Frank came from Brooklyn and had relatives there. Conley in his evidence was chiming in with what he thought to be the facts, but as a matter of fact, Frank had no wealthy relatives in Brooklyn. (See evidence of Mrs. Frank, page 124.)

STATE CLAIMS FRANK WOULD NOT CONFRONT CONLEY AT JAIL.

The state persistently sought to prove by the detectives that after Conley's statement of May 29th, the

detectives sought to have Frank and Conley confront each other. It appears that detectives carried Conley to the jail in an effort to confront Frank. Frank's attorney, Mr. Rosser, was absent in the trial of a case in another county and Frank declined to gratify the officers by having any scene with Conley. Frank frankly admitted declining to meet and pass words with the negro in the presence of his keepers the detectives, and in his statement gives fully his reasons, which we say would appeal to any man who was fair minded. (See Frank's Statement, page 216-7; Evidence of Sheriff Mangum, page 74, Milton Klein, page 137.)

How could a meeting and a bandying of words between Frank and the negro elucidate any issue? The detectives backing up the negro, would have the negro repeat his charges. Frank would deny them. What would this amount to, in any possible view of the matter, except to furnish a cheap sensation? This was simply a play on the part of the detectives—so the defendant thought—and he determined not to gratify them by furnishing them any scene which they could testify about —the defendant believed, to suit themselves.

The defendant in his statement (page 216-7), said that he believed the detectives didn't intend to give him fair play, and that this intention not to give him fair play would extend to twisting and turning to suit their own ends any colloquy which Frank might have with the negro. There can be no doubt that Frank believed the detectives intended to make such use of any colloquy he might have with the negro, no matter what the real evidence might be. That the detectives had made up their minds not to do Frank justice is shown by the admitted way Minola McKnight was treated and the manner in which the testimony of the negro Conley was practically

made to suit themselves, as shown by the testimony of Scott hereinbefore quoted.

FRANK TELLS OF MRS. WHITE'S DISCOVERY.

Frank told Mrs. White's discovery of the negro as soon as he heard it.

The State made a claim that they never learned from the Pencil Factory that Mrs. White had seen a negro at the factory on April 26, and claimed by Detective Rosser that he for the first time drew it out of Mrs. White some weeks after the tragedy. On the trial Detective Scott testified that on Monday afternoon after the tragedy, Frank told him that Darley and Campbell had reported that Mrs. White had seen some negro, in her visit to the factory Saturday morning. (See testimony of Scott, page 80).

KNOWLEDGE THAT CONLEY COULD WRITE CAME FROM FACTORY.

The State also sought to claim that they never found out at the factory that Conley could write and also sought to claim that Frank never disclosed that conley could write.

Frank was in jail when Conley was arrested. Frank never knew that Conley was denying he could write until Leo Gottheimer visiting him told him. Frank explains fully that as soon as he heard Conley was denying he could write, he referred his informants to persons at the factory; and it was there that it was ascertained at the factory that Conley could write, just the moment that inquiry was made, and it does not appear that anybody at the factory knew Conley was denying he could write.

(See Frank, pages 217-218; Scott, page 80; Schiff, page 97).

STATE CLAIMS CLOCK AT FACTORY WRONG.

Not only did the State attempt to change the usual time of the street car which brought Mary Phagan into the city by claiming that it might have come in earlier on the day in question, than its schedule time, because other cars came in on their schedules sometimes ahead of time—but it also claimed that the clock at the factory which Monteen Stover claims to have looked at was too fast.

The State's witness, Gantt, testified that the clock ran sometimes fast and sometimes slow from about three to five minutes, and that it would be corrected each morning by the watchman so as to put it up to the true time. Schiff testified that the clock was correct. But even if the clock did gain from three to five minutes per day, the same witness who swore this, swore that it was set at the true time every morning and if it gained only five minutes in twenty-four hours—from seven o'clock in the morning, when it was correct, to twelve in the day just five hours, it could not have gained exceeding one minute.

But that the clock was correct is shown by the physical fact that Miss Hattie Hall who was in no way contradicted, heard the whistle blow in the city for twelve o'clock as she left the office. She went to the bottom of the stairs, thought of her umbrella, came back up the stairs, got her umbrella, and as she was going out, noticed that the clock was about two minutes past twelve. This shows that the clock was practically correct and could hardly have been as much as a minute ahead of time.

This was the clock by which all the help registered; by which they went to work, by which they quit off from work. A hundred hands depended on it and it would be a great strain on credulity to think that it was allowed to go more than a minute ahead of time.

Granting that the clock at the factory was three minutes fast, how does this help sustain Conley, or the State's case? It will be recalled that Conley stated that Mary Phagan preceded Monteen Stover up the stairway. It will also be recalled that Mary Phagan could not have arrived at the factory before 12:11, or 12:12, so that in any event, if the clock at the factory was ahead of time, it would not, only not corroborate Conley, but further disprove his story in that Monteen Stover must have been in the factory prior to 12:05.

NO EVIDENCE TO CONVICT WITHOUT CONLEY.

From the foregoing summary of the facts, it is manifest that without the evidence of Conley, there is not sufficient evidence to convict Frank and he is in no way connected with the crime. There is no incriminating confession or conduct shown against him; no motive is shown; at the very most, the State simply showed an opportunity to commit the crime, and it is elementary law that mere proof of an opportunity (unless the evidence shows that it was the only and exclusive opportunity and that no other person could have physically committed it) is not sufficient to sustain a conviction.

As the books say, the utmost that the evidence outside of Conley's evidence would have shown against Frank was a suspicion of guilt.

The case of Williams, 113 Ga., 721, was a case of circumstantial evidence much stronger than the case against

Frank, and in the court below there was a conviction. This court, upon Bill of Exceptions, reversed the conviction solely upon the facts, as being unwarranted, and in the Williams case, the defendant was the last person seen with the deceased, and after the disappearance of the deceased, the accused was found with blood on his sleeve, and also left at the house of a friend a pair of trousers that had splotches on them, and the body of the deceased was found in a pond, not far from the bridge where the deceased and the accused had last been seen crossing. The accused also made some statement, more or less evasive and untrue. This court, in reversing the judgment upon the facts, used the following language:

"When a heinous crime has been committed in a community and the people are greatly shocked thereby, it is natural for them to catch at any little circumstance to throw suspicion upon some person and to conclude from this or that circumstance that he is the guilty party. The horror of the crime, and their desire, as good citizens, to see the guilty party punished and the law vindicated, frequently lead them to premature judgment which oftentimes follows them into the jury box, where as jurymen, they not infrequently find persons guilty on bare suspicion alone. This is demonstrated by the records of cases passed upon by this court, commencing with the earlier volumes of our reports and continuing almost to the last one. For a reference to some of these cases, see Bell v. State, 93 Ga., 557. Juries should guard themselves in this respect and not find verdicts on mere suspicion. They should uphold the law as laid down in their own code, whatever may be their private views or prejudices."

It will be borne in mind that Frank has not been caught in a single untrue statement; that from the beginning he evaded nothing; that he answered every

question put to him. There is no element of flight in the case.

Thus it will be seen that the conviction depended solely upon the testimony of Conley.

CONLEY, NEITHER LEGALLY NOR MORALLY, CAN BE BELIEVED.

Under the law it is our contention that there could be no conviction on the testimony of Conley. His testimony would have to be strongly corroborated by other independent facts pointing to Frank as the criminal, and not only is it not so corroborated, but on the contrary, every fact and all reason and logic disprove it. Conley by helping to move the body, as he confesses, was an accessory after the fact.

CONLEY AN ACCOMPLICE IF HIS TESTIMONY IS TRUE.

But his testimony goes much farther than this and shows him to be an accessory before the fact by watching,—which is law makes him a participant in whatever felony was committed.

According to Conley's testimony, Frank was accustomed to commit the offense of Sodomy with women; this in law is a felony and punishable by life imprisonment.

Not only was Conley watching where he had every reason, according to his evidence, to believe such a crime was being committed, but he heard the girl scream and had heard stealthy steps of a person coming back from the metal room and to the office and then going back from the office to the metal room.

Under the authorities which will be discussed under another branch of this case, we think it clear that if a

man assists in the commission of one felony such as Sodomy, by watching, while he knows, or has reason to believe it is being committed, that he participates in the guilt of another felony such as murder which might grow out of the attempt to commit the felony which he had watched to protect.

Under section 1017 of the Penal Code, the testimony in a felony case of an accomplice is not sufficient to convict unless there be corroborating circumstances.

Under another rule of law Conley would require corroboration in this case. Three of the affidavits which Conley made at the instance of the detectives were solemnly sworn to. While of course, they were not made in a judicial proceeding and while he could not have been convicted of the crime of perjury thereon,—still he admitted making these former false statements under oath and he certainly comes within the spirit of section 5884 of the code, that "if a witness swear willfully and knowingly falsely, his testimony ought to be disregarded entirely, unless corroborated by circumstances or other unimpeached evidence."

It will be borne in mind that in this case Conley admitted frequently making false statements, giving one and another reason for it.

COULD CONLEY INVENT AND STICK TO THIS TALE?

But in support of Conley's credibility and as a claim of corroboration, it was insisted by the solicitor general that Conley could not have made up this tale and have stuck to it throughout his long cross examination.

In the first place Conley had every motive to make up a tale which would throw guilt off of himself and on to another man.

In the next place, Conley had denied all knowledge of the crime until he was confronted with facts which conclusively showed his guilt unless he could shift it to somebody else, to-wit: the fact that the notes were in his handwriting.

What was more natural than that Conley, in response to the admitted efforts of the detectives, should fit in a lie which would make his evidence appear reasonable as against Frank?

Detective Scott admits to the fullest extent that the detectives practically made Conley's testimony.

Conley's evidence, as shown by his first two statements, was crude and unreasonable. It never fitted in with anything; he made it appear that the notes were written on Friday, at a time when Frank could not possibly have foreseen, had he so intended, the result of his meeting with the girl. Nothing could have been more bungling or have less of the earmarks of truth about it than his first statement.

Conley was feeling his way with the detectives with lies. The detectives were paring off the excrescences; they were cutting away the incongrous parts of it, as Scott freely admits. Day after Day and by gradual decrease, with whole day sittings with the detectives, Conley's evidence assumes more form until finally the joint effort of the labors of Conley and the detectives, results in the statement of May 29th.

Can it be said that this is the story of Conley? Can it even be said that Conley is remotely responsible for this story, in view of Scott's evidence hereinbefore quoted.

Therefore, the State's contention that Conley could not have invented the story as alleged, amounts to nothing, because the State's own witnesses show that Conley

never evolved this story until he was practically driven into it by the detectives.

SAME SUBJECT—CONLEY TAKEN FROM JAIL AND KEPT IN CITY PRISON BY DETECTIVES.

And his story of May 29 bears no resemblance as we have heretofore fully shown, to his story told on the stand more than two months afterwards, and during these two months Conley was in the hands of the solictor-general and the detectives, having been removed from the jail to the station house so they could keep him alone, and would it not be presumed that the efforts which Scott admits were made to shape Conley's testimony before May 29, continued after May 29 and on up to the trial? It appears from the record that Conley was first held at the city prison as a suspicious character. After his third affidavit (his fourth statement) of May 29, upon the petition of Hugh M. Dorsey, the solicitor-general of the Atlanta Circuit, an order was signed by his Honor L. S. Roan, committing Conley into the custody of the Sheriff of Fulton County. On May 31, a further order was passed by Judge L. S. Roan delivering the said Conley from the custody of C. W. Mangum, Sheriff, to the Chief of Police. This order was consented to by W. M. Smith, attorney for Conley. In the petition, committing Conley to the custody of the sheriff, the Solicitor General represented that Conley was a material witness for the State in the case of the State vs. Frank. Subsequently on June 11, Hugh M. Dorsey, Solicitor General, petitioned the court asking that the orders heretofore granted holding Conley as a material witness be revoked and that said Conley be discharged from custody under

said orders. In said petition the Solicitor-General stated that he was satisfied that the necessity for holding said Conley under the orders heretofore granted under the aforesaid petition as a witness in said case no longer existed. A full record of these proceedings is set forth from pages 307 to 318 of the Brief of Evidence, Defendant's Exhibit 94. It was admitted that at the time of the trial Conley was in the hands of the city detectives, confined at the city prison; that no one had access to him except City Detectives Starnes and Campbell and Solicitor Dorsey, and his assistants. It is also a matter of record that besides the daily visits paid him by the detectives, the Solicitor General conferred seven times with Conley and Mr. Hooper, who assisted the solicitor general, three times. It was also admitted that immediately upon revoking by his honor, Judge L. S. Roan, of the order holding Conley as a witness, a farce was enacted by which Conley was released and immediately re-arrested by the detectives and held in the station house.

Is not the attitude of the Solicitor General and the detectives remarkable? Were they fearful that, if Conley were left to his own resources at the jail, the proper place under the law for the custody of material witnesses, he would repudiate his various statements and affidavits? Why was it necessary to keep him closely guarded by city detectives Starnes and Campbell and why was it necessary for the Solicitor General to visit Conley four times at the station house and have Conley brought to his office three times? The reason for this extraordinary conduct is not clear, but its result was Conley's testimony on the stand in the court below.

In this connection, it is proper to remark that the attitude of the authorities toward the witnesses is remarkable. In the instance of Conley, a negro criminal of

the lowest type and known by the detectives as utterly unworthy of belief, admits the most incriminating fact existing in this murder mystery, to-wit the writing of the notes. It would be almost conclusive proof of guilt of the murder. The only refuge left to a person shown to have written the notes would be to bring some other person in the crime with him, as was done by Conley here; to claim that the notes were written at the instance of another person. Conley was encouraged in every possible way to shoulder the guilt off of himself and put it on Frank. There is nothing more unreasonable in the record than this shift of Conley's. He was completely and absolutely in the hands of the Solicitor and the detectives. The proof shows he was dressed up in good clothes and brought to the trial. Can it be doubted that Conley was so treated because he gave evidence against Frank? Caught with the goods himself, he was encouraged to shift responsibility for the crime on another man.

INSTANCE OF HOW WITNESS FOR DEFENDANT TREATED BY DETECTIVES.

Now, look at the other side of the picture and see what is done to a witness who makes a statement favorable to Frank, as does Minola McKnight. Without any criminal charge, without any warning, this poor woman servant in the Selig and Frank families is taken into custody for no other reason than that she does not make a statement favorable to the officers and against Frank.

She is carried before the Solicitor and made to confront her husband who is being controlled by the detectives and the husband's employers. The woman indignantly denounces her husband as a liar, and because she does not agree with his story as to what she had

told him, they carry this hysterical, shrieking negro woman from Mr. Dorsey's office to the station house and there lock her up until she makes a statement which coincides with her husband and is satisfactory to the detectives. If the record did not show clearly that such a thing had been done, it would be hard to convince this court that in a civilized community such a thing could occur.

We are showing therefore, first, how the witnesses are treated who come up to the detectives' ideas of giving evidence against Frank; and next, how witnesses are treated who persist in telling the truth, even if it is favorable to Frank.

The methods pursued in the Minola McKnight case and in the Jim Conley case, we believe, are typical of much of the State's case.

NOT UNCOMMON FOR NEGROES TO INVENT REMARKABLE TALES.

When it is suggested that Conley could not make up this tale, we can easily conceive that he could have made it up with the able help and with the motive behind him that he had.

Besides, it is common knowledge that negroes are adepts in making up falsehoods when caught in the commission of crime, and can fabricate detailed and circumstantial tales.

STATE CLAIMED CONLEY DID NOT BREAK DOWN ON STAND.

It is not remarkable that Conley did not break down physically on the stand. A parrot can be taught to say "Polly wants a cracker," and can answer thus for an indefinite length of time.

Conley was completely broken down, if to break down a witness is to show that his evidence teems with falsehood and he is wholly unworthy of credit. We are at the end of all argument when the witness voluntarily admits that he has lied almost time without number on material matters.

Conley's story required no great mental power, upon the theory that it is a fabrication. We have shown at the beginning that it was clumsy, illogical and unreasonable. The illogical and unreasonable features were pruned off by the detectives as they admitted, by their course of questioning. Finally, his statement assumed a more plausible form, and that statement he stuck to on the stand fairly well. Whenever a subject came up that he had not made up a tale about he would answer that he did nor know or could not explain, or whenever one of his previous false statements was brought out in conflict with his present testimony on the stand, he would admit that he had lied. Whenever the beaten pathway of the story planned by him was left, he would either answer that he did not know or that he had lied. When a witness answers in this manner, what can be done?

An idea seems to be abroad that if a witness can physically stay on the stand, and in some sort of fashion answer questions for two or three days that he has sustained himself. To break a witness down does not mean that the witness must physically collapse, nor does it mean that he must repent on the stand and say that everything he swore is a lie. The witness is broken down, in the legal sense, if his testimony is such that no reasonable man can believe him.

STATE'S EFFORTS TO SUSTAIN CONLEY FAILED.

The most remarkable things were resorted to in order to sustain Conley. The schedule of the street car which brought the deceased into the city would have to be moved up seven or eight minutes upon a trip that by schedule took from 11:50 to 12:07½ (or 17½ minutes), and that through a crowded part of the city where it was impossible to gain much time; and that in face of the fact that it was against the rule of the company for employees to bring cars in ahead of their time, and that they were demerited or suspended for such an infraction; and that in the face of the fact that the motorman and conductor, in charge of this car, and the State's witness who sat as a passenger by the side of the deceased, all say that the car got into the city on schedule time at 12:07½. All these things must be overcome to make Conley's evidence fit in when he says Mary Phagan arrived ahead of Monteen Stover.

And further, in order to sustain Conley, the State must set ahead of time the clock in the pencil factory by which one hundred people worked, and which their own witness, Gantt, said was corrected by the watchman every morning, and which one witness, Miss Hattie Hall, said on the particular day in question kept time with the city whistles which blew for twelve o'clock.

To break down Conley did not mean that the defendant's attorneys had to hypnotize him nor assault him, or take him off the stand by force, as seemed to be the view of the State below.

But if to break a witness down means to show him to be a criminal of the deepest dye, to plaster him over from beginning to end with perjury, to show the strongest motive imaginable to lie, to show that his testimony was

twisted and turned by detectives who had him in charge, to show that he had not only lied verbally; but that in writing, and under oath he had lied four times,—then this witness was certainly broken down beyond any possibility of repair.

Conley, when he began to talk, felt his way slowly and cautiously. He could easily see the temper of the officers. It was perfectly apparent that they were not after him, but were after Frank. He had but to bring Frank into the matter in the most reasonable way he could imagine, and that the officers, by leading questions, could suggest. It is very probable that if Conley had been let alone after first being confronted with the discovery that he had written these notes, that he would have confessed to the crime.

CIRCUMSTANCES SHOWING CONLEY'S GUILT OF THE MURDER.

At the time Conley claims that the body of Mary Phagan was being moved at 12:56, two men were working on the fourth floor, and there were open stairways from the second to the fourth floor, with the chance that these men were apt to come down any moment, and the front door was unlocked.

The metal room into which Conley claims that Frank took the girl and killed her, had glass doors which rendered the inside visible from without, and these doors could not be locked; and the front doors were not locked at the time the doors of the metal room were open and the body was alleged by Conley to have been brought by the stairway to the elevator. In this condition of things anybody could have entered the building at any time.

How much more reasonable it is that Conley,—under the influence of liquor as he admits,—in a reckless frame

of mind,—urinating on the floor and easing his bowels in the basement, hard up for money as he admits,—hidden by the boxes in the dark area, seeing this little girl coming down the steps with her purse and pay envelope in her hand,—committed this crime? It is the work of but a moment for him to catch her, and in the struggle the girl is injured either by falling or striking some object. She becomes unconscious, and it is the work of another moment to throw her body down the open elevator shaft into the basement, in the other end of which it was found next morning. After throwing the body into the cellar Conley goes down and perhaps assaults the girl, fired as he is with liquor and lust. To make sure she is dead he puts the twine around her neck and drags the body (as the police found the marks of dragging), from the elevator shaft to the back end of the cellar where the body was found.

Conley's character, his opportunity, his partly drunken condition, make this the only reasonable theory on which to account for this murder.

No blood stain was ever found on the elevator, as would have been likely if the body had been carried down the elevator.

The girl's purse and pay envelope were never found, showing she had been robbed.

Conley's evidence as to spending a small sum of money after disposing of the body, about corresponds with the small amount of money the girl had.

The only way really this body could have been moved and could have gotten into the elevator shaft without being seen by numbers of people, at the time Mary Phagan was leaving the building, was a quick assault and a quick throwing of her body into the basement

through the elevator shaft, by Conley, hidden in the dark area. This is the work of but a second.

Whereas, for Frank to take her quite a distance back to the metal room, for the girl to scream, for Frank to come out, and hold his conference with Conley, then to open the metal room doors (all this time the front doors being unlocked and open) and carry the body along the hallway to the elevator on the second floor, get the key to the elevator, unlock the box, load the body into the elevator and carry it down would, and then write the notes, as Conley states, would have taken nearly an hour, and would have exposed the parties to practically certain detection.

Here again, is shown the utter unreasonableness of Frank's having committed the crime, and the ease and secrecy with which Conley could have committed it.

The State's alleged suspicious circumstance that Frank excused Newt Lee from four until six o'clock, is absolutely without significance, in view of Conley's testimony that the body was disposed of finally by half past one. Nothing more was to be done to it except that Conley was to come back in forty minutes and burn it, which he failed to do.

If the girl had been killed in the metal room it would have been the most reasonable place to leave the body. There were a number of vats in the metal room and closets, where the body could have been hidden, and Frank could have come back Sunday, when no one was in the factory, and have disposed of the body at a time when he would not have to take anyone into his confidence.

Conley's capacity for detailed lying is shown in his affidavit of May 28, where he swore fully as to where he

had been on his way from his home to the pencil factory, and in which he minutely described several saloons he went in, the men he drank liquor with, the skin game he was in, and how much he won,—all of which he now admits was false.

FRANK TELLS OF MRS. WHITE SEEING NEGRO.

Does it look reasonable that if Conley was Frank's accomplice Frank would have drawn suspicion on Conley, as well as every other negro in the factory, by telling Scott Monday afternoon that Mrs. White had seen a negro in the building Saturday morning. Would he not have tried to smother up this matter, which might lead to Conley, as much as possible?

NO INDICATIONS THAT FACTORY WAS PLACE WHERE IMMORALITY PRACTICED.

Neither in Frank's office, inner or out, nor in the metal room, nor anywhere in the factory, was there any bed or lounge, upon which any immorality could likely be practiced. The factory was a work shop, full of machines and stock. The only thing approximating a bed were two dirty boxes with a crocus sack placed on them, in the dirt basement, upon which the negro firemen and watchman slept.

WHEN CONLEY MADE AFFIDAVIT OF MAY 28 NO EXCUSE FOR NOT THEN TELLING TRUTH.

When Conley made his affidavit on May 28, he had no reason in the world to leave out anything. His own life was at stake; he was familiar with the factory from basement to top; he had read the newspapers and kept up

with the issues in the case; he knew of the strong effort to place the crime on Frank. He could well tell this from the detective's questions because, as detective Scott says, attention would be called to each weak spot in his evidence, and he would have time to sleep over it and reconstruct it.

Therefore, when in his affidavit of May 28, he says he had cut loose from Frank, that he had made up his mind to tell everything,—and when he leaves out such important things as not seeing Mary Phagan go up stairs, as not hearing any scream, as not seeing Lemmie Quinn, as not seeing Monteen Stover, as not hearing the foot steps go back into the office and from the office back into the metal room, and saying nothing about seeing Frank with the rope in his hands, and saying nothing of watching on other occasions, and saying nothing as to the evidence of degeneracy,—can it be doubted but that all of these matters just suggested were afterthoughts and fabrications pure and simple?

SUGGESTIONS AS TO EASE WITH WHICH CONLEY COULD FRAME HIS STORY.

It came out in the evidence that Frank's wife frequently came to the factory to see him, and that she sometimes did stenographic work for him. We say this as explanatory of the fact that Conley knew Frank had a wife, and that she was a stout woman. The Court will remember that Conley brings into his alleged narrative about writing the notes the statement that Frank alluded to his "fat wife" as wanting an automobile.

How easy it is to see that Conley could invent every detail of his story. He puts the killing in the metal room because he knew the detectives claimed to have found blood and hair there and Frank was on that floor.

He brings in a cotton sack in which he claims he carried the body, because the detectives found no blood on the elevator, and it is necessary to have something under the girl's body to show why there was no blood in the elevator. The leading questions which detective Scott says were asked Conley, and the suggestions which Scott says the detectives made to Conley about this and that appearing unreasonable, could easily bring about these parts of Conley's testimony.

Conley's affidavit of May 29th involved no watching. He only claimed to have helped move the body. How easy for the detective to suggest that it was unreasonable for Frank to call him to help move the body unless they had some previous confidential relations of some sort, and how easy for the question: "Were you not watching for him, and was he not a bad man about woment?" to be cue enough to Conley to suggest this line of testimony to him.

Those who do not believe that negroes can invent stories, even without detective help, to save their own lives or liberty, know little of criminal courts in the South. They can invent the most ingenious and circumstantial stories, and when this tendency of the negro is encouraged as Detective Scott says it was by pointing out the weak spots and strengthening them, the result is a monstrous fabrication which would make the unbelievable stories of Munchausen pale into insignificance.

The crime suggested possibly a Jack the Ripper theory and how easy for the detectives to ask Conley if he had not in his previous watching for Frank seen him in an unnatural position with women? Was not this hint enough for Conley and does not the evidence of Scott as to the method of dealing with Conley by the detectives justify us amply in this suggestion? In this connection

Conley did not even attempt to explain in his evidence as to Frank's alleged degeneracy how it was that on the two occasions Frank happened to be engaged in this conduct so as to expose himself fully to Conley's view?

WHEN CONLEY THREW THIS GIRL INTO THE ELEVATOR SHAFT, HE DOUBTLESS THREW HER PARASOL WITH HER AND AFTERWARDS GOING DOWN, MOVED THE BODY.

This would explain why the parasol was found in the bottom of the shaft. Had the body been carried down on the elevator from the second floor the parasol could not have gotten in the bottom of the shaft, but would have been put out to the side with the body. After Conley threw this girl into the shaft in an unconscious condition, having her purse in his hand, he probably heard someone coming, perhaps Lemmie Quinn, and being afraid that others might come in, he remained hidden in the dark area among the boxes at the end of the stairs, until probably one o'clock when Frank leaves, and locks the door. Conley could then safely go down into the basement, and as we have before mentioned put the twine around the girl's neck and after perhaps assaulting her, drag the body by the heel to the place where it was found, making the trail the policeman found.

WHY CONLEY DID NOT RUN AWAY?

The answer is that there was nothing to direct attention to Conley in the matter at all, and for him to run away would have called attention to him more than any other fact. He is the kind of negro who can stand up and lie, and would prefer to do that rather than to flee.

If Conley had helped move the body as he claims he did, this would have been a very serious participation in the crime, and this fact would have been almost as powerful in making him run away, if he was of the temperament to flee, as if he had committed the murder himself.

WHY WAS STAPLE PULLED OUT OF BASEMENT DOOR?

The staple was pulled out of the back door in the basement, and the door thus opened. There were two reasons why Conley pulled this staple.

First, it was after Frank left and about one o'clock before Conley went down into the basement to move the body, and upon going back up stairs he found the front door locked (Frank having locked it when he left), and was thus forced to go back to the basement and make his way out by prizing the staple off the back door; or, second, after disposing of the body he may have been afraid to go from the basement up to the first floor for fear somebody would see him, and to avoid detection he pulled the staple and went out the back door, leaving it so he could come back at night or some other time, if he desired to do anything else with the body.

There can be little doubt that whoever put this body where it was pulled the staple out, first, for the purpose of going out, and second, for the purpose of leaving the door in such condition that the murderer could come back again, if need be.

These reasons would apply to Conley, who never had a key to the front door, and could not get in the factory Sunday or any other time except when it was open. They would not apply to Frank, who could get in the front door and had the entire run and control of the factory.

THE NOTES AND THEIR INTERPRETATION.

We have hereinbefore quoted the language of the notes. The purpose of the writer was evidently to make it appear that the girl, after her assault but before her death, had written the notes explanatory of the assault.

Some stress was laid on the fact that the word "negro" was spelled "N-e-g-r-o." It is common knowledge that a negro who has had a little schooling, learns to spell correctly the word "negro" as among his first words.

Conley, in his testimony, in reference to writing the notes, admits that he himself wrote the word "negros" and claims that Frank corrected him by having the letter "s" erased; thus by Conley's own admission, he would have spelled the word just as it is spelled in the notes.

The words "did it" are in the notes, and the Solicitor claims below that this indicated that Conley never composed the notes as he would have said "done it." Reference to Conley's testimony in the record will show that he uses the word "did" scores of times, and this is a complete answer to the solicitor's point. He also sometimes uses the word "done." Everyone knows, however, that if a person is writing, the tendency is to use correct language. The fact that Conley frequently used the word "did" shows that he knew that was the correct expression.

For a Northern white man to originate these notes and then use the language appearing in them is inconceivable. It is admitted that the handwriting of the notes was Conley's. They are proved to be in Conley's writing, irrespective of his admissions, by a comparison with his other handwriting.

That the writing of these notes is the most powerful of all evidence as to the perpetrator of the crime we think without doubt. When Conley is shown to have written these notes, is not the case as strong as if the charge had been theft and he had recently been found in charge of the stolen goods?

The idea was a clumsy one that any person should believe the girl had written the notes. The mind of any person would jump to the conclusion that the murderer had written the notes and that they were a clumsy effort to put it on some person other than the murderer.

The longer note is addressed to "Mama" and in effect charges that the negro fireman did the deed and that when the girl went back to make water, he pushed her down a hole; that it was a long, tall, black negro who did it, and the negro fireman.

The substance of the second note is that whoever did it would play like the night watchman did it; but that a long, tall black negro did it by himself.

The only circumstance which makes it look as if the negro Newt Lee had discovered the crime earlier than he did is the language "night witch" in the note and Lee's conduct in explaining what this part of the note meant, to the witness Dobbs, before it had been completely read.

The testimony of the policemen shows that it was very doubtful if Lee discovered the body as he claims he did. He could hardly have seen it from his position in rising from the stool, as he claims, so Anderson and Dobbs testified. Furthermore he testified that the face was upturned when he found it, whereas the policemen found it face downward. It is possible that Lee may have moved the body.

It also appears that it was impossible to tell that this was a white girl until the policemen had raised her dress

and looked at her knee and had also scratched the dirt off of her face; yet Lee telephones the policemen that it is a white girl; and then the very suspicious fact before alluded to, that Lee puts an interpretation upon the note before the policeman Dobbs had finished reading it, makes it look very much as if he had seen the note.

It is not believed that Lee had any part in committing the crime but it is entirely possible that the negro Conley returned to the body or that Lee came upon him in the basement and discovered the body. It is entirely possible that Lee and Conley concocted the plan of writing the notes.

The well known tendency of negroes to protect each other need not be argued.

It is difficult to place any intelligent construction on the notes. They were the act of a densely ignorant criminal yet very cunning negro whose ways were devious and whose motives were difficult to understand. But one thing is certain: No white man under the sun could ever have composed either of these notes.

One part of the first note, in this ignorant negro's unconscious way, gives a key to the truth of the case: the girl says she was pushed down a hole. The negro's mind unconsciously reverted to the real explanation as to how the girl got into the basement when he penned this language. At that time it never occurred to him that she could have gotten down into the basement any way except by being pushed through the shaft. All the talk about the elevator carrying down the body never came up at all until Conley grew acquainted with the detectives' theory that the killing occurred on the second floor, in the metal room.

As before suggested, if Frank had intended to burn this girl's body, would the notes have ever been written

and likely have been left in a place where they would give a clue to the murder, even after the body had disappeared? The very idea in writing the notes was to explain why the body was lying in the cellar where it was. Had the body been burned, the notes would have been useless and incriminating.

Where is the difference in its effect as to showing Conley the guilty man, between showing these notes to be his act, and finding Conley's knife or Conley's pistol by the corpse, in case death had been inflicted by a knife or pistol?

In this case the remarkable fact exists that a heinous crime is committed; that lying by the body is a conclusive piece of physical, written evidence as to who committed the crime, if its authorship can be proved. We find a debased criminal who is proved to have been the author of this damning evidence; who has told scores of lies about the transaction, and yet in order to excuse and clear himself, he brings in a decent, highly educated, responsible citizen and loads that responsible citizen down with the vile charge of Sodomy, and in such case the good life counts for nothing. All the circumstances of the case count for nothing and you are to take absolutely and without any qualification the word of this confessed participant's statement as to just how the murder occurred. We submit that never before in the civilized world has there been such a spectacle.

PARTICULARS WHEREIN SOLICITOR CLAIMS CONLEY WAS CORROBORATED.

In his argument the Solicitor-General, recognizing the necessity of corroborating Conley, undertook to enumerate the particulars in which he claimed Conley was corroborated.

Mr. Dorsey first claimed that the State's proof as to Frank's bad character for lasciviousness sustained Jim Conley. Of course, this unfair argument is without weight in a court, but with an untrained jury it perhaps had weight. The overwhelming proof was in Frank's favor as to his character. The few ex-employees coming from the hands of the detectives—the same persons who manipulated the Jim Conley evidence and who undertook to manipulate the Minola McKnight evidence, can be readily understood. These girls were not undertaking to say anything of personal knowledge but only their opinion of Frank's character, from what they had heard. Frank could have been slandered in their presence and that would afford a basis for their prejudiced evidence. Such evidence, of course, is no proof corroborating Jim Conley.

Mr. Dorsey next claimed that the failure of the defendant's counsel to cross-examine the women put on the stand by the State to testify against Frank's character, corroborated Jim Conley. Of course, such an argument as this needs no reply.

Mr. Dorsey next claimed that Frank's relations with Miss Rebecca Carson corroborated Jim Conley. We have already shown that Frank had no relations with Miss Rebecca Carson and that on two or three occasions some of the State's women witnesses testified that he had gone into a dressing room, which never even had a lock on the door, during work hours, in broad day light. Miss Carson was a forelady, and the presumption of any right minded man would be that Frank's only relations with her were in a business way and nothing to the contrary was proved. Such evidence can amount to nothing.

Mr. Dorsey next claimed that the dressing room incident alluded to by the Jackson woman corroborated Jim

Conley. We have already quoted the evidence of this woman, which simply shows that after working hours began, when none of the girls should have been in the dressing room, that Frank opened the door and looked in. And it is shown that there were complaints of the girls flirting from the windows in this room; that there was no toilet or bath in it; that the girls simply changed their outer clothing there and that there was no lock even, on the door.

Mr. Dorsey next claimed that the evidence of Darley and Mattie Smith, as to Mattie Smith coming up the stairs and going down, on April 26th, and Darley talking to her, and the kind of clothing Mattie Smith wore, corroborated Jim Conley. This evidence was very powerful proof that Jim Conley was the murderer because in order to see Mattie Smith and Darley and describe Mattie Smith's clothes as Conley did, he would have to be in the dark area at the bottom of the steps where the elevator shaft is—and it shows conclusively how Conley watched, awaiting an opportunity to attack any unprotected woman, going up or down the stairway.

Mr. Dorsey claimed next in general language that McCrary, the old negro drayman, sustained Jim Conley. Just how he sustained him, Mr. Dorsey never said. Jim Conley claimed that it was McCrary who advised him to go down in the elevator shaft that morning and ease his bowels and McCrary said that was false.

Mr. Dorsey next claimed that Monteen Stover sustained Jim Conley. Here again Monteen Stover furnished the most powerful evidence to show that Conley had sworn falsely. Monteen Stover claims to have arrived at the factory as hereinbefore stated, at 12:05, whereas Mary Phagan could not have arrived before 12:11 or 12:12; yet Conley makes Monteen Stover arrive after Mary Phagan.

Mr. Dorsey next claimed that Lemmie Quinn sustained Jim Conley. Here again the falsity of Conley's testimony is clearly shown by Quinn, as Conley claimed that Quinn got to the factory before the Stover girl, whereas Quinn showed that he arrived after both of them.

Mr. Dorsey next claimed that the witness Dalton sustained Jim Conley. Just how he sustained him is not clear because Dalton does not claim Frank ever practiced immorality in the factory and only shows that he, Dalton, did.

Mr. Dorsey next claimed that Daisy Hopkins' bad reputation sustained Jim Conley. Just how it did we do not see. Daisy Hopkins' bad reputation may to some extent sustain Dalton in his claim of having had intercourse with her, but this is very far from having anything to do with the Phagan murder.

Mr. Dorsey next claimed that the alleged blood on the second floor sustained Jim Conley.

Here again Conley had simply made his evidence fit in with what the detectives claimed to be the facts. Conley could just as well have killed the girl in the metal room as Frank, although the most likely theory is that he pushed her down the elevator shaft.

The women's toilet was in this metal room, and Conley watching as he was these women and girls going up and bringing down their money, may have heard Mary Phagan go back to the metal room to the women's toilet. The metal room was quite a distance from the office and entirely out of view from the office. Conley could have followed her into the metal room and there assaulted her, and after Frank left, could have even come to the second floor and thrown the body down the elevator shaft by moving the elevator up a few feet, as it usually stayed on the second floor.

Mr. Dorsey next claimed that a negro named Jones who said he saw Conley shortly before two o'clock, spending money at a bar room on Hunter Street, sustained Jim Conley. Yes, and this fact also sustains the defendant's theory that Conley had shortly before this killed the girl and was spending her money.

Mr. Dorsey next claimed that Albert McKnight in telling when he saw Frank at his home, sustained Jim Conley. Here again Albert McKnight in swearing that he saw Frank at the Frank home at 1:30 shows the falsity of Conley's evidence, because Conley swore Frank was at the factory at 1:30 and it would have taken at least a quarter of an hour to get to his home if he caught the car promptly.

Mr. Dorsey next claimed that the repudiated affidavit of Minola McKnight sustained Jim Conley. We have already shown how this repudiated affidavit happened to be made and it is a very dark chapter in the administration of justice in Georgia.

Mr. Dorsey next claimed that the use of the cord around the neck sustained Jim Conley. Just how this pointed to Frank as committing the crime any more than Jim Conley or any one else is hard to understand. All the evidence showed that these cords were all over the factory from top to bottom; that Conley had access to every part of the factory and why Conley could not have used the cord as well as Frank is difficult to understand.

Mr. Dorsey next claimed that the existence of the notes sustained Jim Conley, because, as Mr. Dorsey expressed it,—no negro in the history of the race, after having perpetrated robbery or rape ever wrote a note to cover up his crime. Just how Mr. Dorsey happened to know this is not clear to us. It seems to us a very extravagant statement. A negro who can write is just as apt to write to cover up his crime as any other person.

Mr. Dorsey next claimed that the note paper on which the notes were written—paper found in abundance on the office floor, sustained Jim Conley. Evidence of Schiff, page 97 Darley, page 37, show this kind of paper is found all over the factory; that it was used by the employees in taking stock and making reports; that it was swept into the trash and was found in abundance in the trash pile, in the basement; and even if it was only found on the office floor, Conley had complete access to that floor—just as much so as Frank.

Mr. Dorsey next claimed that in the diction of the notes appeared the language: "did it" and that this sustained Conley because Conley throughout his evidence said "I done." A perusal of Jim Conley's evidence will show that numbers of times he used the word "did," and that while he occasionally used the word "done," that he used the one expression practically as much as the other.

Mr. Dorsey next argued that the fact that one of these notes stated that a negro did it by himself sustained Jim Conley and showed an effort on Frank's part to throw it off on the negro race. This is an unfair construction of the notes. The notes unconsciously assume that a negro did it because it was a negro's crime and the writer of the notes had little reason to believe anybody but a negro would be suspected of such a crime; charging it on this long, tall, lean, black negro was not an effort to charge it on the negro race by itself but was an effort to charge it on the lean, tall black negro individually, rather than some other individual. It was an effort to charge the crime on one man as having done it by himself and no effort to put it on the negro race rather than the white race.

Mr. Dorsey next claimed that when Harry White came down at three o'clock and borrowed $2.00 from Frank,

that Frank should have made an entry on a book charging it to him and that his failure to charge it to him sustained Conley in his charge that Frank committed the murder. As a matter of fact Frank made the $2.00 slip against White and put it in the cash drawer and it was found by Schiff and taken out of White's wages. (See Schiff, page 100). In other words, the $2.00 was simply carried as cash and when it was accounted for by White the transaction ended.

We have gone substantially through the things which Mr. Dorsey claims sustain Conley and we say, with all deference, that they have not the slightest tendency towards sustaining Conley's testimony.

DEFENDANT'S STATEMENT ANSWERS AND EXPLAINS EVERY FACT RELIED ON BY STATE.

We ask the court to read carefully the defendant's statement. It was delivered on the stand by the defendant verbally, without a note in hand. Remarkable for its accuracy, its lucidity and its detail, corroborated as it is by practically all the admitted facts in the case, it seems to us to establish beyond a reasonable doubt an hypothesis not only consistent with innocence, but absolutely inconsistent with guilt.

The defendant denounces the statement of Conley as a tissue of lies from beginning to end. He denounces Dalton's statement as false in every particular and the charge of perversion he brands as an outrageous fabrication.

We particularly call to the attention of this court the fact that this statement is corroborated by the testimony of those witnesses whose names appear on the alibi chart hereinbefore set forth on pages 22-26, inclusive.

THE MOTION FOR NEW TRIAL.

We have heretofore given a statement and discussion of the facts. We will now discuss the various grounds of the motion for new trial.

The motion for new trial consists of numerous grounds, the result of a long and stubborn trial. It, however, is not our purpose to discuss each ground separately or follow the motion in its numerical order,—but we shall, as far as can be done logically, group the grounds of the motion with reference to subjects, and not numbers.

FRANK'S INTERVIEW WITH LEE.

(Ground Nos. 1 and 2, pages 2 and 3, Motion for New Trial).

Immediately after the murder, on April 29th, 1913, about midnight, Frank, at the suggestion of Detectives Black and Scott, had, in the station house, an interview with the witness, Lee, then under suspicion, to the end that Frank, as Lee's employer, might induce Lee to tell all, if anything, he knew about the crime.

Frank was instructed by the detectives just how he should approach Lee, and just what he should say.

Upon the trial it was a matter of hot dispute as to just what occurred at that interview. Frank insisted that he substantially followed the instructions of the detectives. The State insisted that he departed widely from such instructions, that the interview was of short dura-

tion, was a mere sham on the part of Frank and in no sense a bona fide effort to obtain information.

To maintain this contention of the State, Lee was permitted to testify over objection that the same was irrelevant, immaterial and a conclusion, that Black, a detective in the case, had at the station house about the same time talked to him longer and asked him more questions than did Frank, and that Frank on April 29th, 1913, talked with him a shorter time than did Mr. Arnold, one of Frank's attorneys, who, for the purpose of the trial, and just prior thereto, interviewed the witness Lee at the Fulton County jail.

This testimony of Lee was objectionable. Lee's statement that Black asked him more questions and talked to him longer than Frank, and that Arnold talked to him a longer time than Frank, were conclusions of this negro, and so indefinite as to be of no real value in a honest investigation. If the facts and surrounds of each interview had been given, it might have been demonstrated that the negro's comparisons of the interviews were out of joint.

Even if not conclusions, the comparative length and verbosity of the interviews threw no light upon the guilt or innocence of Frank. His interview with Lee might have been of few words and of short duration, but of very great potency in seeking information from the suspected negro, or it might have been long drawn out and consisting of many words, and yet worthless in the matter of seeking the truth.

But this irrelevant evidence was not harmless—an improper use could have been made and was made of it to the hurt of the defendant. The argument was sophistically made that, inasmuch as the detectives, in seeking the truth, and the attorney, Arnold, in likewise seeking

the truth, consumed so much time and used so many words, that Frank, if he was likewise seeking the truth from Lee, would consume the same time and words; since he did not consume as much time nor as many words, he was not seeking the truth, and his failure to seek the truth was because of his guilt. His own counsel could not get the truth from Lee except in a given time; Frank took no such length of time and was not, therefore, seeking the truth.

The sting of this evidence might have been extracted in a calm, sane trial, but not in this.

LEE COMPOSED.

(Grounds 3 and 9, pages 3 and 5, Motion for New Trial).

Over appropriate objections, witnesses were permitted to swear that the negro Lee, a witness for the state, was not nervous when and after he discovered the body, but was calm and composed.

Lee was at first one of the suspects, and was kept in jail as a material witness up to and including the trial.

At the date of the trial, this negro Lee was not a suspect; neither side made any pretense that he was connected with the crime. He was a witness, nothing more. Had the contention been that Lee committed the crime, and not Frank, material evidence as to Lee's conduct would, of course, have been admissible, but the conduct of Lee, the witness, except as that conduct illustrated his credibility and efficiency as a witness, was wholly immaterial. Whether he was morose or buoyant, phlegmatic or emotional, could throw no light on Frank's guilt or innocence. Frank's conduct in certain particulars was a matter of moment—but the conduct of the witness Lee,

except as it illustrated his value as a witness, could not rightly be a factor in the Frank case.

It was, of course, offered by the solicitor as a basis of a comparison between the conduct of this negro and Frank. The unfair and illegal purpose was to contend that Lee, the innocent witness, was composed, while Frank was not composed—was nervous—and therefore not innocent. There was evidence that Frank was nervous on the morning of the tragedy. This nervousness —in the light of Lee's composure—was loudly proclaimed as evidence of guilt.

What an outrage to make this comparison the basis for even a suspicion of guilt against Frank! Theoretically, Frank and Lee may be children of a "common mother," but what an abyss separates this educated Cornell alumnus from this ignorant African night watchman! How foolish to measure the emotional conduct of this white Caucasion by that of this ignorant African witness!

Why take this negro witness as the basis of comparison? Why not take the Chief of Police, the Chief of Detectives, the detectives themselves, all of whom were in close touch with the situation on the morning of the murder?

Clearly because none of them was on trial—their emotions or lack of emotions were immaterial.

FRANK NERVOUS.

(Ground 6, page 4, Motion for New Trial).

The Court permitted the witness Black to testify, over objections, that in a conversation had with Frank months before the tragedy, that he did not remember

anything that caused him to believe that Frank was then nervous.

The evident purpose of this was to compare Frank's conduct, in a conversation with the witness months before the tragedy, with his conduct at the date of the murder.

The unfairness of such a comparison is evident. His situation and surroundings during the conversation were wholly different from those on the morning of the murder. There was then nothing to shake his nerves or to excite his emotional nature. The lake of his inner being, so far as the evidence goes, was in a state of perfect calm.

How different on the morning of the murder! He was taken by detectives into a morgue and, without notice or warning, a light was flashed upon the corpse of a young girl, bruised, dirty and disfigured.

From the morgue he was taken to a factory under his direction and control, where the foul murder was supposed to have been committed. He was in the midst of mystery and crime—in touch with murdered youth and innocence, where but a few hours before there was youth and life.

What man under such circumstances would not have been nervous? Who is there, situated as Frank, no matter how innocent, whose nature is so callous as to stand unmoved, unemotional and unconcerned? How cruel and unfair it was to compare Frank's nerves, when in casual conversation with Black, with his nerves on the morning of the murder!

The argument was that he was innocent and composed when he first talked with Black. He was nervous on the morning of the crime and hence not innocent.

FRANK EMPLOYS COUNSEL.

(Ground 7, page 4, Motion for New Trial).

On the Monday after the discovery of the crime Sunday morning, detectives Black and Haslett brought Frank to the station house. Whether he was technically under arrest is in dispute in the evidence, but he did not, of his own initiative, go to the station house. He was brought there by detectives.

Montag, his friend and superior officer, hearing that he was at the station house in charge of detectives and knowing that he was unknown to the officers and a stranger to courts, got into communication with Mr. Herbert Haas, and, together, they went to the station house. When there, permission to see Frank was denied them. Thereupon, they called L. Z. Rosser, with the request that he come to the station house. He came, and when he reached the station house, Haas, Montag and Rosser were permitted to confer with Frank. The Court, over defendant's objection that same was irrelevant, permitted the witness, Black, to testify "that Frank had counsel, Messrs. Rosser and Haas, about eight or eight-thirty o'clock Monday morning, while Frank was in the station house, brought there by detectives Black and Haslett."

Frank was held by detectives at the station house. Whether rightly or wrongfully, he was entitled to counsel. The right to have counsel is a constitutional right, of which neither officers nor court could deprive him. If Frank employed counsel, he did nothing more than exercise that constitutional right.

Can it be said, in doing that, he subjected himself to suspicion—that he must forego that right, or exercise it at the peril of having its very exercise turned into a suspicion of guilt? The constitution guarantees counsel,

but when the guarantee is accepted, it comes covered with the slime of suspicion!

This evidence was peculiarly hurtful to the defendant. The solicitor-general used it with venom against him. He pressed upon the jury that no innocent man would, under the circumstances, have engaged counsel—that he engaged them because he was guilty and for the purpose of protecting him in his guilt.

Doubtless, if he had not employed counsel, the claim would have been made that his guilt was so great that he despaired of aid, even from the most eminent counsel.

CONLEY'S TESTIMONY NOT RULED OUT.

(Grounds 10 and 11, pages 5 and 6, Motion for New Trial).

The negro witness Conley, at the instance of the Solicitor General and upon direct examination, testified as follows:

Q. "What did he mean?"

A. "Well, what I taken it to be, the reason he said he wasn't built like other men, I had seen him in a position I hadn't seen any other man in that has got children."

Q. "What position?"

A. "I have seen Mr. Frank in the office there about two or three times before Thanksgiving and a lady was in the office, and she was sitting down in a chair and she had her clothes up to here (up to her waist) and Mr. Frank was down on his knees, and she had her hands on Mr. Frank, and I found them in that position."

Q. "When you came into the office before Thanksgiving day, now, when the lady was sitting in the chair?"

A. "Yes, sir; he saw me when he came out of the office, he saw me."

Q. "What was said when they saw you?"

A. "When Mr. Frank came out of the office, Mr. Frank was hollering 'Yes, that is right, that is right,' and he said, 'That is all right, it will be easy to fix it that way.'"

Q. "Well, did you ever see him on any other occasion?"

A. "Yes, sir; I have seen him on other times there."

Q. "What other occasions?"

A. "I have seen Mr. Frank in the packing room there one time with a young lady lying on the table."

Q. "How far was the woman on the table?"

A. "Well, she was on the edge of the table when I saw her."

Before any cross-examination had been had as to either of the circumstances referred to in the above questions and answers, defendant, by his counsel, moved the Court to rule out, withdraw and exclude from the jury each and all of the questions and answers supra, because said evidence was illegal, irrelevant, wholly prejudicial and involved other things and transactions not legitimately under investigation, and amounted to an accusation against defendant of other and independent crimes. (See Ground 10 of Motion). The Court overruled the motion.

The defendant also (see Ground 11 of the Motion) under the same circumstances and conditions and for the same reason, moved to rule out the substance of said questions and answers put in narrative form, and the Court made the same ruling.

In these two grounds is contested the right of the State in this murder trial against Frank to introduce evidence of other independent and disgraceful crimes.

There is no dispute that this negro witness meant to

charge Frank with dirty and filthy perversion. The jury understood that, for the witness Henslee, in his affidavit replying to charges against his fairness as a juror, asserts that the evidence produced upon the trial, convinced him that Frank was a pervert. Evidently he referred to this evidence of Conley's, for there is no pretence that there was other evidence upon this subject.

That this evidence was a terrible blow to Frank will not be disputed. The Court declined to take it from the jury. If true, it stamped Frank as a pervert. The jury believed it, and in believing it, Frank was doomed.

Perhaps nothing is more despicable to the average man than perversion. Every human sympathy is withdrawn from one who practices it. Accuse a man of it, and you at once proclaim him guilty of every other crime. Its very nature implies universality. It stretches out its arms like the sea and takes in all the shores of crime. When the jury received the shock that Frank was a pervert, the process of finding him guilty of murder was a very tame affair, for if he was a pervert, he was certainly, and very clearly, a murderer, too!

These acts testified to by Conley had no connection with the crime here charged against Frank. The most disgusting of them occurred before Thanksgiving Day of the previous year. The time of the other instance is not given. There is no suggestion that it was in any way connected or associated with the killing of Mary Phagan. Indeed, this disgusting evidence was thrust into the case to serve no purpose except to disgrace and damn Frank and arouse against him the deepest prejudice of the jury. They occurred months before the murder and were devoid of any relationship with that unfortunate event. They are wholly disassociated; there is not a single link that binds the one to the other. Concede that they do

establish that Frank is a dirty cur, they do not aid in the least to establish that he is, as well, a vile murderer. Indeed, perversion and murder are not even kindred crimes. The pervert is vile, but he does not kill. Perversion is vile effeminacy, lacking wholly the demoniacal force involved in murder.

Of course, if this evidence was admissible, Frank cannot complain, even though it has destroyed him, but we most earnestly insist that it was inadmissible and that the Court, upon the motion made, ought to have ruled it out.

Our Code states the rule thus:

"The general character of the parties, and especially their conduct in other transactions, are irrelevant matter, unless the nature of the action involves such character and renders necessary or proper the investigation of such conduct." Code 5745.

Our Supreme Court, in the case of Cawthon vs. the State, 119 Ga., 408 and 409, states both the rule of the Code, supra, and the exceptions:

"When one is on trial charged with the commission of a crime, proof of a distinct and independent offense is never admissible, unless there is some logical connection between the two, from which it can be said that proof of the one tends to establish the other. While this rule is general and subject to few exceptions, still there are some exceptions; as when the extraneous crime forms part of the res gestae; or is one of a system of mutually dependent crimes; or is evidence of guilty knowledge; or may bear upon the question of the identity of the accused, or articles connected with the offense; or is evidence of prior attempts by the accused to commit the same crime upon the victim of the offense for which he stands charged." (See Gillett on Ind. & Col., Ev. Par. 57; Whart. Crim. Ev. (9th ed.) Par. 30 et seq.; Kerr's Law of Homicide, Par. 469; McKelvey on Ev. Pars. 156-157; Underhill's Crim. Ev. Par. 87 et. seq.; 1 Bish. New

Crim. Proc. Par. 1120 et. seq.; 1 Gr. Ev. (15th ed.) Par. 53; 1 Crim. Law Mag. 29; Farmer v. State, 100 Ga. 41 (2).)

Conley's evidence of isolated acts of perversion is admissible under none of these exceptions. Frank's conduct before Thanksgiving and in the packing room can form no part of the res gestae of the Phagan murder. They form no part of a system of mutually dependent crimes. They are not evidence of guilty knowledge, nor do they bear upon the identity of the accused nor with articles connected with the offense, nor are they evidence of prior attempts by Frank to commit the same crime upon the victim of the offense for which he here stands charged, nor do they tend to prove malice, intent or motive; indeed they have no connection whatever with the Phagan murder.

That this testimony is included in the rule and excluded from the exceptions is established by abundant authority.

"Where one on trial for carrying a concealed pistol stated to the jury in his defense that he 'did not own a pistol, and never carried one in his life,' and a witness in his behalf undertook to testify to the same effect, evidence that the accused had, on an occasion previous to that under investigation, openly carried a pistol, was irrelevant, for it related to a matter not germane to the issue."

Davis vs. State, 113 Ga. 749.

In the case of Robinson vs. State, 6 Ga. App. 696 defendant was convicted of bigamy. At the trial the State offered a policeman for the purpose of proving the first marriage. Over the defendant's objection, the policeman was allowed to testify, on direct examination, that he had arrested the defendant in Lawrence, Mass., in 1901, on

the charge of cruelty to his wife. Defendant alleged error in admitting this evidence.

The court held: "The issue made by the indictment and the defendant's plea of not guilty was whether or not he had knowingly contracted the second marriage while his first wife was still living and undivorced. There was nothing in the indictment to put the defendant on notice that he would be called upon to defend himself from the charge that, seven years prior to the time alleged in the indictment, he had been arrested in a distant State for an offense in no way connected with the one charged in the indictment. The evidence tended to confuse the jury, to prejudice them against the defendant, and to take him by surprise and put him to the defense of a charge which he was not informed would be brought against him. The general rule is that upon the trial of a person for a criminal offense, other and distinct criminal transactions can not be given in evidence against him . . . .

"But the rationale of the rule of allowing evidence of other offences to be proved in cases of that kind does not extend to the limits allowed by the trial judge in the case at bar. In a certain sense the fact that a man has committed one crime might in some degree make it more or less probable that he would commit another one; but such evidence is not rejected because it is irrelevant primarily, but because it tends to confuse the issues, to take the prisoner by surprise and put him to the defense of charges not made issuable by the indictment, and tends generally to prejudice the jury against him, and to put his character in issue against his will and without his consent."

"It is not in the trial of an indictment for one offense, competent for the State to prove the previous conviction of the accused of another and entirely different offense; and this is so though a fact necessarily established by that conviction was one relevant to the case on trial."

Gay vs. State, 115 Ga. 204.

While it is the general rule upon the trial of a person for criminal offense, other and distinct criminal transac-

tions cannot be given in evidence against him, yet according to the weight of authority, evidence of other transactions may be received as tending to show motive or intent when the transactions are so connected in time and so similar in their several relations that the same motive may reasonably be imputed to all.

Justice Story states the principle thus: "In all cases where the guilt of the party depends upon the intent, purpose or design with which an act is done, or upon the guilty knowledge, I understand it to be a general rule that collateral facts may be examined into in which he bore a part, for the purpose of establishing a guilty intent; in short, wherever the intent or guilty knowledge of a party is a material ingredient in the issue of a case, these collateral facts, with his other acts and declarations of a similar character tending to establish such intent or knowledge, are proper evidence. In many cases of fraud, it would be otherwise impossible to establish the true nature and character of the rule."

Farmer v. State, 100 Ga. 41.

This statement of Judge Story is apt in all those cases where the intent, purpose or design, or guilty knowledge, is essential.

In the case at bar, the nature of the murder itself could not possibly leave the intent with which the act was done in doubt. The criminal intent is conclusively presumed. Such would not be the case where money is obtained under false pretenses, or where stolen goods are received, or narcotics sold.

On the trial of one charged for the sale of intoxicating liquor, it was error to admit testimony that he had been living in a state of adultery with a named woman.

Judge Pottle said: "The trial judge erred in permitting the State to prove that the accused had been living in a state of adultery with a named woman. We do not see how this conduct of the accused, though unlawful, could illustrate the question of his guilt or innocence

of the offense of selling intoxicating liquor. The admitting of testimony above referred to was sufficiently prejudicial to require a new trial."

Holmes v. State, 12 Ga. App. 359.

In the case of Ray vs. State, 4 Ga. App. 67, the defendant was on trial for the larceny of a bale of cotton, which he had sold in the name of W. M. Moore, having received a check to the order of Moore and endorsed Moore's name thereon. The State introduced testimony, over the objection of defendant, that he had stored several other bales of cotton in a warehouse and had sold them in the name of W. M. Moore. Defendant objected to this evidence on the ground that it might tend to establish other larcenies on the part of the defendant.

The Court rules "that as a general rule in the prosecution of a particular crime evidence tending to show that defendant has committed other crimes is not admissible, and this is always true if the facts proved do not of themselves tend to illustrate the transaction in issue, or to establish some necessary ingredient of the particular offense under investigation. The evidence was relevant in the present case."

It will be noted that in this case, the defendant sold the bale of cotton for the larceny of which he was on trial in the name of Moore. He entered a plea of not guilty. Certainly the other transactions which he conducted in the name of Moore tended to illustrate the issues involved in the case at bar, and were properly admitted, upon the theory that the crime for which defendant was on trial was one of a series of transactions carried on by him, the tendency of all of which was to show a criminal intent.

"Evidence of the commission of a crime other than the one charged is generally not admissible."

"To make one criminal act evidence of another, a connection between them must have existed in the mind

of the actor, linking them together for some purpose he intended to accomplish; or it must be necessary to identify the person of the actor, by a connection which shows that he who committed the one must have done the other." . . . . .

"If the evidence be so dubious that the judge does not clearly perceive the connection, the benefit of the doubt should be given to the prisoner, instead of suffering the minds of the jurors to be prejudiced by an independent fact, carrying with it no proper evidence of the particular guilt." . . . . .

The Court says: "In order to justify the admission of evidence relating to an independent crime committed by the accused, it is absolutely essential that there should be evidence establishing that the independent crime was committed by the accused and satisfactorily connecting that crime with the offense for which the accused is indicted. Even if the evidence establishes the commission by the accused of the independent offense, it is inadmissible until it be shown satisfactorily that the crime had some connection with the transaction then under investigation."

Cawthon v. State, 119 Ga. 395.

"On the trial of one charged with a violation of the act of 1903 in obtaining money on a fraudulent promise to perform a contract of service, evidence that three years previously the defendant had filed a plea of guilty to an accusation charging him with a violation of the same act, the transactions being in no way related one to the other, but entirely separate and distinct, was irrelevant and inadmissible, as it did not tend in any way to illustrate the intent of the accused in the transaction for which he was then being tried."

Clark v. State, 5 Ga. App. 93.

On a trial for the offense of obtaining money upon a fraudulent promise to perform labor, in violation of the act of August 15, 1903 (Acts of 1903, p. 90), evidence that the defendant had on a previous occasion fraudu-

lently obtained money on another contract, the two contracts being in no wise connected or related, and the first act not in any way tending to illustrate the intent of the defendant in procuring the money under the second contract, was not admissible. Taylor vs. State, ante, 237 (62 S. E. 1048); Clark vs. State, ante, 93 (62 S. E. 663)."

Denham v. State, 5 Ga. App. 303.

In the case of Stanley vs. State, 9 Ga. App. 141, at the trial for violation of the act to provide against the evil resulting from the sale of narcotic drugs and regulating the sale thereof, the court admitted testimony of other transactions between the defendant and other persons, showing prescripions given by the defendant. This testimony was clearly admissible for the purpose of illustrating the issue of good or bad faith on the part of the accused in prescribing and furnishing narcotic drugs. "The general rule is well settled that upon the trial of one for criminal offenses, other and distinct criminal transactions cannot be given in evidence against him. But the exception to this general rule is equally well settled that evidence of other transactions which are similar in character and closely connected in time, and which tend to show motive or intent, may be received in evidence, and that when the intent or guilty knowledge of the accused is a material ingredient in the issue of the case, other acts and transactions of a similar character tending to establish such intent or knowledge, are proper evidence." It will be noted in this case the trial judge charged the jury as follows: "Certain testimony has been offered by the State in regard to other prescriptions said to have been given by the defendant. The only case you are trying is the case set out in this particular indictment, and therefore, if it be shown that the defendant furnished this drug or any drug to other persons than the persons named in this indictment, you are not trying

that case, but such testimony has been permitted by the Court to go in evidence upon the question of intent and motive, to show whether or not there was a systematic course adopted by this defendant to furnish this drug not in good faith, but for the purpose of evading the provisions of the act, and so far as the testimony admitted may show that, then it is relevant. If it does not indicate a lack of good faith, or intent or motive, showing a general course of conduct which may illustrate the intent and motive in the particular case, then it is not relevant."

In the Stanley case, supra, it will be noted again that the intent to violate the act regulating the sale of and traffic in narcotics cannot be presumed from the transaction at issue in that case, whereas in the case at bar, the intent is presumed from the nature of the crime committed.

In the trial of defendant for larceny, the court admitted testimony that the accused was in possession of other stolen property. A divided court admitted the testimony, stating "ordinarily evidence of other criminal transactions is not admissible. Some of the exceptions are when it shows a system of mutually dependent crimes, or is evidence of guilty knowledge, or bears upon the questions of the identity of the accused, or articles connected with the offense, or where evidence of other transactions tends to prove malice, intent, motive or the like. If the issue of other transactions tends to illustrate the transaction at issue, or to establish some necessary ingredient of the particular offense under investigation, it is admissible."

Martin v. State, 10 Ga. App. 795.

It will be noted that this case is closely on the border line with that class of cases where guilty knowledge is an important factor.

"Where a practicing physician is charged with having prescribed cocaine for an habitual user of the drug,

not in good faith believing it to be necessary for the proper treatment of the case, but in evasion of the act of August 22, 1907, (Ga. Laws 1907, p. 121), the prosecution may, in order to prove his state of mind at the time of the particular transaction charged in the indictment, show that during the same general period of time the defendant made a common practice of furnishing such prescriptions to other persons for whose treatment the drug was not deemed necessary, and that he furnished the prescriptions in such numbers and in such a way as to negative his good faith."

Judge Powell says: "Now, to prove in a criminal case that the defendant is a person of criminal bent of mind is not without probative value on the issue as to whether he committed the particular crime involved; for criminals are more likely to commit new crimes than are persons free from the taint of previous criminality. To prove that the defendant had committed other offenses would naturally cause the jury more readily to believe that the defendant committed the particular offense in question; and this from a logical standpoint would not be a misuse of the testimony. The real misuse is likely to come about by reason of the jury's becoming so prejudiced against the defendant personally on account of these other crimes that they could not fairly weigh the testimony against him in the particular case—that is, by reason of the danger of the jury's convicting the defendant 'on general principles' as the common saying is, instead of determining his guilt of the specific offense for which he stands charged. This likelihood of the misuse of the testimony, this danger of arousing the prejudices of the jury, requires the courts to be very careful in allowing proof of other crimes, and affords the chief reason underlying the general rule mentioned above, that such evidence is not ordinarily admissible.

"Whether an exception shall be declared is a question depending usually upon a weighing of the opposing considerations of expediency and of juridic policy. **If the other crimes are so distinct from the one alleged in the**

case before the court that the relevancy of the proof is slight or its probative value small toward the establishment of guilt in the particular instance, and the element of the case which they illustrate is susceptible of easy proof by other methods less likely to be attended with misuse by the jury or with other judicial disadvantages, no exception should be allowed; and in such cases it is the practice of the courts not to admit the testimony. But there are cases where the other offenses are so interwoven with the facts of the case on trial, or are so strongly illustrative of some feature of the case, as to outbalance the general expediency of excluding the testimony as to them; and in such cases the courts generally deem it good policy to allow the exception and to admit the testimony.

"Intent, good faith, motive and other such matters relating to the state of a person's mind are usually not easily susceptible to direct proof. But frequently the state of mind accompanying the doing of an act is illustrated by other acts of a similar nature done by the defendant in such a way as to indicate a general practice or course of conduct, or as to display motive, knowledge, intent, good faith, bad faith, and a variety of other such things. The relevancy being patent, and other methods of proof being difficult or inadequate, the weight of ex pediency is in favor of admitting the proof of these other acts, though they themselves constitute crimes. It is not the fact of their being crimes or of their showing the defendant's bad character that furnishes the probative value essential to their admission in evidence. It is their distinct relevancy to the particular case on trial and the special need for the testimony which justify the admission of the evidence.

"Approaching now the case at bar with these general principles in view, we find the court trying the defendant on a charge involving the necessity of the State's proving that at the time the defendant prescribed cocaine for Frances Townsend, he did so not in good faith and because he deemed prescribing of the drug necessary to her

treatment, but because his state of mind was such that he was willing to furnish the prescription in order to aid her to get the drug in evasion of the law. The defendant's beliefs, his motives, his state of mind were matters primarily resting in his own breast. The defendant's plea of not guilty denied that his state of mind was that charged in the indictment. To leave the decision of this all-controlling question resting on the proof of the individual transaction alone would have been to leave it doubtful. But the defendant at the time of this transaction was engaging in a course of practice which strongly illustrated his state of mind in the particular instance. He was daily issuing a large number of these prescriptions, indiscriminately and apparently to all comers. This course of practice, it is true, was made up of a number of separate acts which in themselves were crimes. But the acts had relevancy to the issue on trial, and strongly probative value, not so much because they showed that the defendant was a frequent or habitual lawbreaker, but because they tended to show what state of mind the defendant had in him at the time he did the act under inquiry in the case at bar."

Lee v. State, 8 Ga. App. 413.

"Evidence of a prior conviction of a similar offense, or the pendency of an indictment for a like offense offered by the State is incompetent to prove the charge made in the indictment under which the defendant is being tried. Such evidence is hurtful as giving the jury an opportunity to infer that the accused is a persistent violator of the law against gaming and is in all likelihood guilty of the charge brought against him."

Bashinski v. State, 123 Ga. 508.

"On a trial for the crime of assault with intent to rape, the alleged victim being a girl eight years old, the mother of the girl was allowed to testify, over objection, that another daughter, several years older, had complained to her husband and herself that the defendant

had on a previous occasion 'ravished her while she was with him in a buggy on the way home from church'. Held, error demanding another trial.

Judge Hill says: "The mother of the child who was the victim of the alleged assault was allowed to testify, over the objection of the defendant, that another daughter, fourteen years of age, had told her and her husband that the defendant, while she was riding in a buggy with him on her way home from church, had ravished her. We think the court committed very serious and prejudicial error in admitting this testimony. It was objectionable for several reasons. It was hearsay. It was a mere conclusion of the daughter who had told of the occurrence. It was charging defendant with a separate and distinct crime. Even if he had been on trial for a criminal assault on the girl who gave this information to her parents, the testimony would not have been admissible against him, for it is well settled in such cases that only the fact of the complaint is admissible, and not any of the details of the criminal transaction. The learned solicitor-general insists that the evidence was admissible to rebut the statement of the defendant to the jury that he girl who had made the statement to her mother was pure and innocent, and that the prosecutor was actuated by malice against him. We think that the testimony was not admissible for this purpose, or for any other purpose, and that its admission was so hurtful as to demand another trial. It was calculated to inflame the passions of the jury and to excite their prejudice."

Webb v. State, 7 Ga. App. 35.

"When a defendant is indicted for having or carrying concealed weapons at a particular time and place, it is not competent for him to introduce evidence upon the trial to prove that it was his general habit to carry his weapon about his person openly exposed to view."

George Washington vs. State, 36 Ga. 243.

"On the trial of a defendant for carrying concealed weapons, when the State relies for conviction upon positive proof that the accused had a pistol concealed at a

certain time and place, testimony that his habit on previous occasions was not to carry his pistol concealed upon his person is not admissible."

Oliver vs. State, 106 Ga. 142.

It is a general rule in criminal evidence that on the trial of a person accused of a crime, proof of a distinct and independent offense is inadmissible. The following are cases showing particular instances where the rule has been applied:

State v. Lepage, 57 N. H. 245, 24 Am. Rep. 69;
People v. Asher, 126 Mich. 637, 86 N. W. 140;
Jansen vs. People, 159 Ill. 441, 42 N. E. 862;
State vs. O'Donnell, 61 Pac. 892;
Davis vs. State, 74 N. W. 599;
Lightfoot vs. People, 16 Mich. 507;
State vs. Smalley, 72 S. W. 1005;
Hill vs. State, 73 S. W. 9.

Generally speaking, evidence of other crimes is admissible to prove the specific crime charged when it tends to establish (1) motive, (2) intent, (3) the absence of mistake or accident, (4) the common scheme or plan embracing the commission of two or more crimes so related to each other, that proof of one tends to establish the others, (5) the identity of the person charged with the commission of the crime on trial.

Criminal motive is the inducement existing in the mind of the person causing him, first, to intend and afterwards to commit a crime. The motive to be established is the motive which induced the crime charged. To hold otherwise would be to sanction the violation of the general rule in the guise of an exception to it. The motive in the criminal acts to which Conley testified would

be lasciviousness, but would that be the motive underlying the killing?

Werner, J., in People vs. Molineux, 168 N. Y. 264, 62 L. R. A. 193, says: "Although it seems unnecessary to cite authorities whenever motive is to be established, it must be the motive which underlies the crime charged, we will briefly refer to a few cases which illustrate the rule. In Pearson vs. People, 79 N. Y. 424, 35 Amer. Rep. 524, the defendant was charged with the murder of one W. The alleged motive was defendant's desire to possess the wife of the deceased. On the trial, evidence was received to show that eleven days after the death of W. the defendant and the wife of the deceased appeared before a clergyman in Michigan to be married. Defendant there took an oath that there was no legal objection to the marriage. Although this evidence tended to prove the commission of another crime than that for which he was on trial, the court said 'This evidence tended to prove that the motive which operated upon the prisoner was a desire to possess W's. wife and that he was determined to overcome all obstacles standing in his way.' In Stout vs. People, 4 Park, Crim. Rep. 132, the crime charged was murder. On the trial evidence was received of an incestuous connection between the defendant and his sister, the wife of the deceased. This was held to be competent, even if it did prove the commission of another crime, for it tended to disclose the motive which prompted the defendent to get rid of the deceased. In Hawes vs. State, 88 Ala. 37, 7 So. 302, the defendant was on trial for the murder of one of his children. Two other indictments were then pending against him for the murder of his wife and another child. Evidence was received to support the theory that the motive for the killing of all was to open the way for a second marriage, which was consummated a few days after the last death. This was held proper, because the motive was the same in each case. In People v. Harris, 136 N. Y. 443, 33 N. E. 65, the defendant was accused of the murder of his wife. The marriage had been secretly performed. Evidence of abortions per-

formed upon his wife by the defendant were held to be admissible to show defendant's efforts to keep the marriage secret, and as tending to show a motive for the poisoning of the wife when the secrecy was no longer possible or the alliance had become burdensome. So, on the trial of a husband for the murder of his wife, evidence of criminal proceedings against the defendant for failure to support his family, made ten months before the murder, was properly held admissible upon the question of motive. People vs. Otto, 4 N. Y. Crim. Rep. 149. In another case, the defendant was charged with the murder of his brother's wife. The brother, his wife and two children were poisoned with arsenic. The brother and his wife died, but the attempt upon the lives of the children failed. Thereupon the defendant procured himself to be appointed the guardian of his brother's children, and then commenced to create and utter various false and forged claims upon his brother's estate. The theory of the prosecution was that the defendant coveted his brother's estate, and, in order to gain possession of it, conceived the plan to murder those who stood in his way; that failing in the attempt to kill the children, he attempted to accomplish his object by forgery. It was held that evidence properly received of all the crimes involved in this theory, as it was relevant upon the existence of motive for the commission of the crime charged. People vs. Wood, 3 Park, Crim. Rept. 681. Cases of this character might be multiplied indefinitely, but enough have been cited to show that when evidence of extraneous crimes has been held competent upon the existence of motive, it has been either the specific motive which underlay the particular crime charged, or a motive common to all of the crimes sought to be proved."

Evidence of a distinct substantive offense as a general rule cannot be admitted in support of another defense. Such proof is never admissible unless there is some logical connection between the two crimes from which it can be said that one tends to establish the other. On the trial for murder, the admission of evidence that

defendant committed the crime of assault upon the wife of the murdered man within a half an hour after the killing upon the theory that such evidence tended to prove the motive or intent with which the homicide was committed, was prejudicial error. Paris vs. People, 129 Ill. 521, 21 N. E. 821, 4 L. R. A. 582; in that case the Court stated: "Here was proof of a distinct felony, disgusting and abhorrent facts attending upon the commission of that most brutal and infamous crime given in detail. No one need be told that from that moment, if the evidence was believed, all feeling of commiseration and mercy toward the defendant must have fled the minds of the jury. There was left for him no possible escape from the death penalty. But aside from all these considerations, we are required to settle the rule of evidence in criminal trials, not merely with reference to this case, but in consideration of future consequences and other rights, and we cannot from that consideration alone hesitate to hold that there was such a manifest and prejudicial error in the admission of evidence by the trial court in this case as must ask a reversal of the judgment."

The following cases support the doctrine that evidence of other crimes may be introduced to establish the motive, but the motive established by the other crime must be the underlying motive: West v. State, 42 Fla. 244, 28 Sou. 430; Commonwealth v. Ferrigan, 46 Pac. 386; Hamlin v. State, 50 S. W. 1019; State vs. Bradley, 67 Vt. 465, 32 Atlantic 238.

Indictment for attempt to obstruct railroad track. Held it was not competent to show prior attempts to obstruct the track of the railroad.

Judge Cobb says: "Evidence of the commission of a crime other than the one charged in the indictment is generally not admissible; but there are exceptions to this rule. Evidence of prior attempts by the accused to commit the same crime upon the victim of the offense for

which he stands charged is admissible; or where other offenses committed by the accused tend to prove malice or motive or the like, evidence of other offenses is sometimes admitted. But in all cases where evidence as to the commission of other offenses is admitted, there must be a connection between them and the offense with which the accused is charged. 'To make one criminal act evidence of another, a connection between them must have existed in the mind of the actor . . . or it must be necessary to identify the person of the actor by a connection which shows that he who committed the one must have done the other.' Cawthon v. State, 119 Ga. 396, 408, and cit. Some of the evidence admitted in the present case, as to prior attempts to obstruct the track of the railway, did not connect the accused in any way with such prior attempts. This evidence was inadmissible and highly prejudicial to the accused."

Alsabrook v. State, 126 Ga. 100.

Indictment for assault with intent to murder. It was held that evidence which tends to show that the accused has committed a crime, wholly independent of the offense for which he is on trial, is irrelevant and upon objection should be excluded. The court refused to allow the solicitor-general to show that on the day after the assault for which defendant was indicted, the defendant drew a knife on the prosecutor and threw a rock at him. The court said that this evidence necessarily tended to create in the minds of the jury the impression that the accused was of a violent temper and aggressive nature and eager to inflict a personal injury upon the prosecutor, and that it had no connection with the alleged assault which was the basis of the indictment, and did not take it out of the general rule, which forbids the introduction of evidence tending to show that the accused has committed a crime wholly independent of the offense for which he is on trial.

Nesbitt vs. State, 125 Ga. 51.

There was a fight between two persons. They were separated. Thirty minutes thereafter, while one of them was undergoing examination as to his wounds, he was attacked by the other one. It was held that the two fights were distinct; that the first made no part of the second, and that, therefore, on an indictment for the second, evidence of the first was not admissible.

Whilden v. State, 25 Ga. 396.

Judge Fish says: "The indictment for bastardy was found at the October Term, 1903, of Carroll Superior Court. It charged that the accused refused to give the bond required by the statute, Sept. 23, 1903, and that he was then the father of the bastard child. It did not allege when the child was begotten. The court, over the objection of the accused, permitted the State to put in evidence an indictment, found at the April Term, 1901, of said court, charging the accused with having seduced the prosecutrix on July 22, 1900, with a verdict thereon, rendered in the Superior Court of the county, finding him guilty of fornication. It does not appear from the record when the verdict was rendered. The objection urged to the admissibility of this evidence was that it was irrelevant and immaterial. The objection was well taken, and the evidence should heve been excluded. The verdict that the accused was guilty of the offense of fornication with the prosecutrix fixed no particular time when the offense was committed; as the jury that tried that case might have found the accused guilty of fornication, upon evidence showing that he committed the offense with the prosecutrix at any time within the statute of limitations prior to the finding of that indictment. And there was nothing to show that the child referred to in the bastardy proceedings was the result of the fornication for which the accused was found guilty. This being true, such indictment and the verdict thereon could throw no light whatever upon the issues in the bastardy case."

McCalman vs. State, 121 Ga. 491.

"On the trial of one charged with the illegal sale of intoxicating liquors, it was error to admit evidence of such a sale by the accused more than two years prior to the date of the accusation, and to charge the jury that they might 'consider these transactions as circumstances in arriving at a proper verdict'."

Irwin vs. State, 121 Ga. 580.

In Cawthon vs. State, 119 Ga. 395, at p. 418 Judge Candler says: "On the trial of A for shooting and killing B, evidence that some time previously to the transaction under investigation A had shot and killed C would not, without more, be admissible; but there could be no objection to showing that in an attempt to kill B, A had shot at him, but missed him and killed C."

2. Intent is the purpose to use particular means to effect a result. Evidence is admissible to show intent where the crime is one where guilty knowledge is of the essence. Such cases are those receiving stolen goods, violation of acts regulating the sale of narcotics by physicians, forgery, passing counterfeit money. In these cases intent is of the essence of the crime and previous offenses of a similar character by the same person may be proved to show intent. Under this exception to the general rule, nearly every Georgia case where proof of other crimes was held admissible may be classed.

In Lee vs. State, 8 Ga. App. 413, 416 Justice Powell states: "Now, to prove in a criminal case that the defendant is a person of criminal bent of mind is not without probative value on the issue as to whether he committed the particular crime involved; for criminals are more likely to commit new crimes than are persons free from the taint of previous criminality. To prove that the defendant had committed other offenses would naturally cause the jury more readily to believe that the defendant committed the particular offense in question; and this

from a logical standpoint would not be a misuse of the testimony. The real misuse is likely to come about by reason of the jury's becoming so prejudiced against the defendant personally on account of these other crimes that they could not fairly weigh the testimony against him in the particular case—that is, by reason of the danger of the jury's convicting the defendant 'on general principles', as the common saying is, instead of determining his guilt of the specific offense for which he stands charged. This likelihood of the misuse of the testimony, this danger of arousing the prejudices of the jury, requires the courts to be very careful in allowing proof of other crimes, and affords the chief reason underlying the general rule mentioned above, that such evidence is not ordinarily admissible.

"Whether an exception shall be declared is a question depending usually upon a weighing of the opposing considerations of expediency and of juridic policy. If the other crimes are so distinct from the one alleged in the case before the court that the relevancy of the proof is slight or its probative value small toward the establishment of guilt in the particular instance, and the element of the case which they illustrate is susceptible of easy proof by other methods less likely to be attended with misuse by the jury or with other judicial disadvantages, no exception should be allowed; and in such cases it is the practice of the courts not to admit the testimony. But there are cases where the other offenses are so closely interwoven with the facts of the case on trial, or are so strongly illustrative of some features of the case, as to outbalance the general expediency of excluding the testimony as to them; and in such cases the courts generally deem it good policy to allow the exception and admit the testimony.

"Intent, good faith, motive, and other such matters relating to the state of a person's mind are usually not easily susceptible of direct proof. But frequently the state of mind accompanying the doing of an act is illustrated by other acts of a similar nature done by the de-

fendant in such a way as to indicate a general practice or course of conduct, or as to display motive, knowledge, intent, good faith, bad faith, and a variety of other such things. The relevancy being patent, and other methods of proof being difficult or inadequate, the weight of expediency is in favor of admitting the proof of these other acts, though they themselves constitute crimes. It is not the fact of their being crimes or of their showing the defendant's bad character, that furnishes the probative value essential to their admission in evidence. It is their distinct relevancy to the particular case on trial and the special need for the testimony which justify the admission of the evidence.

"Approaching now the case at bar with these general principles in view, we find the court trying the defendant on a charge involving the necessity of the State's proving that at the time the defendant prescribed cocaine for Frances Townsend, he did so not in good faith, and because he deemed the prescribing of the drug necessary to her treatment, but because his state of mind was such that he was willing to furnish the prescription in order to aid her to get the drug in evasion of the law. The defendant's beliefs, his motives, his state of mind were matters primarily resting in his own breast. There was no direct way for the State to prove this feature of the case. The defendant's plea of not guilty denied that his state of mind was that charged in the indictment. To leave the decision of this all-controlling question resting on the proof of the individual transaction alone would have been to leave it doubtful. But the defendant at the time of this transaction was engaging in a course of practice which strongly illustrated his state of mind in the particular instance. He was daily issuing a large number of these prescriptions, indiscriminately and apparently to all comers. This course of practice, it is true, was made up of a number of separate acts which in themselves were crimes. But the acts had relevancy to the issue on trial, and of strong probative value, not so much because they showed that the defendant was a frequent or

habitual lawbreaker, but because they tended to show what state of mind the defendant had in him at the time he did the act under inquiry in the case at bar."

In such cases the intent is not presumed from the nature of the act, but in a case of murder, the intent is inferable, unless the death be accidental. Does the nature of the tragedy of the case at bar make it necessary to look for intent from other acts?

In the Molineux case, 168 N. Y. 264, 62 L. R. A. 193, Werner, J., states: "If A undertakes to kill B, and in the attempt kills C, the crime committed is no less a murder than it would have been if B had been killed. The agency employed to encompass the death of Cornish was cyanide of mercury,—a poison so rare and deadly that it is not kept on sale in places where strychnine, arsenic and other poisons are sold. It was disguised in an effervescent salt called 'bromo seltzer', which is a much used remedy for headaches and other trifling human ills. The bottle containing this mixture was carefully prepared to create the impression that it contained nothing but the harmless bromo seltzer. It was accompanied by a silver bottle holder into which the bottle fitted. Both of these articles were inclosed in a box of the kind used in the sending of gifts. An empty card envelope was added to create the impression that it was a gift, and that the sender had forgotten to inclose his card. It was sent by mail on the eve of Christmas, when, according to the universal custom of this country, gifts are exchanged in this manner, and when even the most cautious and prudent person might have taken counsel of his generosity, rather than his suspicions. Could such a foul and cunningly devised act have been innocently done? Could proof of any number of repetitions of this act add anything to the conclusive inference of criminal intent which proof of the act itself affords? Can it be possible that, in the face of such irrefragable indicia of murderous intent, it is still necessary or proper to prove the commission of other similar crimes to establish intent? These questions carry

their own answers. If intent may not be inferred from such an act as this, then there is no such thing as inference of intent from the character of the act."

The weight of authority sustains the proposition that if there be evidence of intent, either inferable or patent, evidence of other transactions or crimes is not admissible, since this exception is founded on necessity, and the introduction of such evidence should be permitted only where the expendiency of the case demands it. Regina vs. McDowell, 5 Cox CC 153; People vs. Lansdale, 122 Mich. 388, 81 N. W. 277; Strong vs. State, 86 Ind. 208, 44 Amer. Rep. 292.

An exception to this rule is the admission of evidence of previous transactions between the defendant and the injured party. Ross vs. State, 62 Ala. 224; State vs. Patza, 3 La. Ann. 513; Lawrence vs. State, 8 Ala. 524; State v. Merkley, 74 Iowa, 695, 39 N. E. 111.

In Georgia this rule is followed with the restriction that the previous transaction must be connected with, or throw light upon the transaction involved in the case at bar.

In Roberts vs. State, 123 Ga. 146, a husband was on trial for the alleged murder of his wife, evidence tending to show a long course of ill-treatment and cruelty towards her continuing until shortly before the homicide, is admissible. Such evidence tends to show malice, and motive and to rebut the presumed improbability of a husband murdering his wife.

In Pound vs. State, 43 Ga. 89, when the court admitted in evidence a particular act of insult, a quarrel between the prisoner and deceased occurring several months before the homicide, and not connected with the cause occasioning, it held that the admission of acts of previous quarrels, of particular acts, to be admissible

against the prisoner must not be a distinct, separate and independent act, but there must be some link of association, something which draws together the preceding and subsequent acts, something which gives color of cause and effect to the transaction and sheds a light upon the motive of the parties to render such particular act or acts admissible. The state of feeling generally between them may go in evidence to illustrate their conduct at the time. On page 132, the court stated that "the courts have not agreed upon the time dividing legal or illegal evidence, so far as its admissibility is permitted, in the relation to acts between the parties preceding the homicide, and no general rule can be distinctly traced over this disputed ground of judicial controversy. All we may assert, within the principle recognized, is that there must be some link of association, something which draws together the preceding and subsequent acts, something which presents cause and effect in the transaction. If separate, distinct and independent, they ought to be excluded, for while every spark of light may be admitted, it must be struck out of the facts of the case by bringing them together. As for illustration, if A and B had a previous difficulty, and A attempted to shoot B and by interference was prevented, and the parties separated and several months elapsed, and upon meeting A and B commenced an attack and either got killed, who was right or wrong in the previous difficulty is not material, and ought not to be considered by the jury; but the fact of the difficulty itself, showing the temper of the parties when they subsequently met, might lead the jury into a proper understanding of the acts of the relative parties and their conduct at that time. But the mere fact of not speaking, or slight personal difficulties, could only tend to embarrass the jury by introducing an element not connected with the case and could only darken the counsels of the jury as let in as an element for their consideration."

In the trial of a murder case, it was not competent

for the accused to prove that on a former occasion, remote in time from the date of the homicide, he had done an act which had incensed the deceased, it not appearing that what occurred on that occasion, or that it was followed up by any subsequent quarrels, or difficulties between the accused and the deceased ,or that the act of the accused on the previous occasion referred to, tended to throw any light whatever upon his motive in taking the life of the deceased.

Daniel v. State, 103 Ga. 202.

In Hatcher vs. State, 18 Ga. 460, it was held not to be error for the trial court to require counsel to begin with defendant's offense, charged in the indictment, and travel back to his first fight before that should be given any proof. Judge Lumpkin says in his opinion that "by getting in proof of the first fight and then failing to connect the two, injury would have been done."

It is not, in a trial for murder, competent to prove that years before a homicide, there had been a difficulty or quarrel between the accused and the deceased, without showing that in consequence thereof the former had continuously entertained hostile feelings toward the latter, or that the old grudge had something to do with the homicide, and as a rule the connecting evidence should begin with the killing and travel backwards to the original difficulty.

Horton vs. State, 110 Ga. 739.

In the case of Monroe vs. State, 5 Ga. 85, it was held that threats accompanied with occasional acts of personal violence are admissible to justify the reasonableness

of the defendant's fears, provided the knowledge of the threats is brought home to him, and repeated quarrels may be shown between the parties to establish the malo animo. But you cannot go back to a remote period and prove a particular quarrel or cause of grudge unless it be followed up with proof of a continual difference flowing from that source.

An interesting case is that of the State vs. Walters, 45 Iowa, 389. Under an indictment for criminal assault, evidence of prior assaults upon the prosecutrix were admissible to show the intent with which the act charged was committed, but under an indictment for criminal assault evidence that the defendant had repeatedly assaulted another female is incompetent, and because of its admission in evidence a judgment of conviction will be reversed.

MISTAKE OR ACCIDENT.

Evidence of other crimes has been held admissible in the trial of a criminal offense to rebut the defense of accident or mistake thereby establishing the doubtful cause of the particular death by other previous similar deaths.

These are known as the so-called poisoning cases. See Regina vs. Garner, 3 F. & F. 681; Regina vs. Cotton, 12 Cox CC 400; Regina vs. Geising, 18 L. J., Mc., N. S. 215; Regina vs. Heeson, 14 Cox CC, 40; Zoldoske vs. State, 82 Wis. 581; Goerson vs. Commonwealth, 99 Pa. 588; People vs. Seaman, 107 Mich. 348.

There is no claim of accident in the present case, and therefore no necessity to discuss the doctrine of these cases.

COMMON PLAN OR SCHEME.

Evidence of other criminal acts are sometimes admitted in the trial of one accused of another crime to show that all acts were committed by the same person in pursuances of a single design, plan or scheme, or under circumstances which render it impossible to prove one crime without proving all. In this exception to the general rule, there must be evidence of a system including the offense on trial and the one sought to be introduced. They must be connected as parts of a general composite plan or scheme, or they must be so related to each other as to show a common motive or intent running through both. This connection must clearly appear from the evidence. If the court does not clearly perceive it, the accused should be given the benefit of the doubt and the evidence should be rejected. This class of cases are usually those of forgery, passing counterfeit money, receiving stolen goods and the like.

Another class is where one crime is committed pursuant to another crime, such as where A committing highway robbery on B, kills C, who attempts to aid B.

In Shaffner vs. Commonwealth, 72 Pa. 63, 13 Amer. Rep. 651, the Supreme Court of Pennsylvania said: "To make one criminal act evidence of another, a connection between them must have existed in the mind of the actor linking them together for some purpose he intended to accomplish, or it must be necessary to identify the person of the actor by connection which shows that he who did the one must have done the other. Without this obvious connection, it is not only unjust to the prisoner to compel him to acquit himself of two offenses, instead of one, but it is detrimental to justice to burden a trial with a multiplicity of issue that tend to confuse or mislead the jury. The most guilty criminal may be innocent."

In commenting on this decision, Werner, J., said in People vs. Molineux, supra, 263: "This statement voices

the keynote of the distinction between the civil law and our own more merciful common law. Under the former, there is no presumption of innocence. A mere official charge of crime puts the accused upon his defense. His hitsory is an open book, every page of which may be read in evidence by the prosecution. Every crime or indiscretion of his life may be laid bare to feed the presumption of guilt. How different is our own common law, which is the product of all the wisdom and humanity of all the ages! Under it the accused comes into a court of justice panoplied in the presumption of innocence, which shields him until his guilt is established beyond a reasonable doubt. His general character can be thrown into the balance by no one but himself. The incidents of his life, not connected with the crime charged, are his sacred possession. He faces his accuser in the light of a distinct charge, with the assurance that no other will be or can be proved against him."

AS TO IDENTITY.

There are a few cases where the evidence of extraneous crime has been admitted to identify the person who committed the crime charged in the indictment. Justice Werner, in the Molineux case, supra, states: "A large number of cases while distinctly recognizing the existence of this doctrine have held it inapplicable to the particular facts then before the court. The reason for this is obvious. In the nature of things there cannot be many cases where evidence of similar and distinct crimes, with no unity or connection or motive, intent, or plan, will serve to legally identify the person who committed one as the same person who is guilty of the other. The very fact that it is much easier to believe in the guilt of an accused person when it is known or suspected that he has previously committed a similar crime proves the dangerous tendency of such evidence to convict, not upon the evidence of the crime charged, but upon the superadded evidence of the previous crime. It gives opportunity for the conviction of an accused upon mere prejudice, instead of

by evidence showing the actual commission of the crime for which the defendant is on trial. It compels the defendant to meet an accusation not charged in the indictment, which he might successfully refute if given the opportunity to do so unembarrassed by other issues.

The application of this principle is shown in the case of People vs. Rogers, 71 Cal. 565, 12 Pac. 679; Commonwealth vs. Choate, 105 Mass. 451; Hope vs. People, 83 N. Y. 418.

Evidence of other criminal acts which are a part of the res gestae of the crime alleged in the indictment have been held admissible. Pritchard vs. State, 92 Ga. 65, 18 S. E. 536.

Wigmore on Evidence, Sec. 194: "It may almost be said that because of this indubitable relevancy of such evidence that it is excluded. It is objectionable, not because it has no appreciable probative value, but because it has too much. The natural and inevitable tendency of the tribunal of the judge or jury is to give excessive weight to a vicious record of crime thus exhibited, and either to allow it to bear too strongly on the present charge, or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge. To use all alleged particular acts ranging over the entire period of the defendant's life makes it impossible for him to be prepared to refute the charges in order, all of which may be mere fabrications."

This is the law and always has been the law. It is ably expressed by Lord Chief Justice Holt in Harrison's trial, 12 Howe, St. Pr. 833, 864, 874. The defendant was on trial for murder. A witness was called to speak of some felonious conduct of the defendant three years before. "Hold, hold, what are you doing now? Are you going to arraign his whole life? How can he defend himself of charges of which he has no notice, and how many issues are to be raised to perplex me and the jury? Away, away, that ought not to be; that is nothing to the matter."

In Lipham vs. State, 125 Ga. 52, it was held on a trial of one charged with incest, evidence tending to establish incest at times other than and prior to that relied on for a conviction is admissible as throwing light upon the relations of the parties toward each other.

Judge Cobb says: "Complaint was made that evidence was admitted, over the objection of the accused, to the effect that, about a year before the date of the alleged offense, the accused and his stepdaughter had slept together in a covered wagon on different nights, once in Thomas County and once in Florida. The accused was on trial for an offense committed in Colquitt County. There was no error in the admission of this evidence. It was relevant for the purpose of throwing light on the relations between the parties." Bass vs. State, 103 Ga. 227; Underhill's Crim. Ev. Sec. 92.

The only testimony offered to support the conviction of the defendant being illegally obtained and inadmissible, a new trial should have been granted, even though on the trial before the judge without the intervention of a jury no formal objection to the evidence was interposed. "Testimony which is incompetent and inadmissible because the law stamps it as wholly unworthy of consideration can not, because it may not have been challenged on the trial of a case, be treated by a reviewing court as having any probative force or value whatever."

Davis vs. State, 4 Ga. App. 318.

Judge Fish says: "Where the State, in a trial for fornication, relies for conviction upon proof showing that the accused, an unmarried man, and the other alleged guilty party, an unmarried woman, were, at a certain time and a designated place, in a position relative to each other which, taken in connection with other proven circumstances, strongly indicated that the act of sexual intercourse was taking place between them, evidence of former lascivious familiarities between the same parties,

within a comparatively recent period, increases the probability that the offense charged was actually committed at such time and place. Proof of such lascivious conduct between the parties as that shown by the evidence objected to in the present case, in the very nature of things, and in accordance with observations of human conduct, shows a tendency or disposition in each party toward the commission of the sexual act with the other; it shows that modesty and self-respect, strong safeguards of virtue, had been previously broken down, and that the parties were already upon such terms of lascivious intimacy as to render it probable that, given the opportunity, they would indulge in sexual intercourse with each other. Testimony of this character is peculiarly relevant where, as in this case, the evidence as to the surroundings of the parties at the time that the offense is alleged to have been committed is such as to show a boldness and want of care to avoid detection, which might seem unnatural and improbable, unless it were shown that their previous conduct toward each other was of such a character as to induce the belief that illicit relations had already been established between them. In the case under consideration, the evidence as to the previous lascivious conduct between the parties strongly tended to create a belief in a rational mind that they had been criminally intimate prior to the occurrence upon which the State relied for a conviction. It was clearly admissible for the purpose of throwing light upon the relations existing between them, and as tending to illustrate the real nature of their conduct at the time and on the occasion when the State claimed the offense was perpetrated. The authorities which sustain its admissibility are abundant. In Gillett on Indirect and Collateral Evidence, Sect. 58, the rule in reference to the admissibility of such evidence in a case of this kind is stated as follows: 'Where the question at issue is as to the existence of a criminal intimacy at a certain time, evidence of prior acts of indecent familiarity is competent as tending to show an antecedent probability.' See the numerous cases from the courts of different States, there cited in support of this proposition; also Abbott's

Trial Brief, Criminal Causes, Sect. 508, subheads, Adultery and Incest, and the cases cited."

In People vs. Asher, 86 N. W. 140, 126 Mich. 637, the Defendant, while on trial for murder, testified that he had been arrested on a previous occasion for another murder, but had been discharged, and the prosecution went into the details of the alleged offense in rebuttal, and alleged that the defendant was guilty of murder on that occasion. Held that the admission of such testimony, even in rebuttal, was error.

On the trial of defendant for criminal assault alleged to have been committed on the person of his daughter, a girl of 12 years, it was error to admit for any purpose, evidence of a like offense subsequently committed on the person of another daughter.

"In criminal proceedings the necessity is stronger, if possible, than in civil, of strictly enforcing the rule that the evidence is to be confined to the point in issue. It is, therefore, a general rule that the facts proved must be strictly relevant to the particular charge, and have no reference to any conduct of the prisoner unconnected with such charge. . . . . When a defendant is put upon trial on an indictment, he is presumed to be ready to meet the charge contained in the indictment, but he is not presumed to be ready to defend himself against a charge not made against him in the indictment, nor does the law require him to meet such a charge.

In this case the court attempted by instruction to limit the evidence objected to, to a contradiction of the defendant's statement.

"On the trial of the defendant for this charge, would it be possible to prove that the defendant had been guilty of a like offense on another daughter who was only a year or two older, and confine the effect of such evidence on the mind of the jury to some trivial or insignificant matter that arose on the trial? The answer to this question is obvious. It is true that the commission of one offense

is not evidence of the commission of another and an independent offense; yet the proof of the one cannot be said to be without influence on the mind of the juror, convincing him that the defendant may be guilty of the other."

Jansen v. People, 139 Ill. 637, 42 N. E. 862.

"Where, in a prosecution for larceny of a calf, the evidence showed that one jointly indicted with defendant had purchased from defendant the calf in question, together with two others, and afterwards sold all three, it was error to admit the testimony of a State's witness that one of the other calves had been stolen from him; it not appearing that the larceny of the second calf occurred in connection with the crime charged, or was committed at the same time or in the same locality."

State vs. O'Donnell, 36 Ore. 222, 61 Pac. 892 (Ore).

Upon a trial for burglary, the evidence of a former one in the same house and of defendant's connection with it, is irrelevant. Such testimony should be excluded as likely to prejudice the jury and lead to the defendant's conviction by proof of charges he cannot be expected to anticipate. The Court said:

"The rule of exclusion is even more important in criminal than in civil cases. The consequences of its violation are more serious and the danger of conviction on irrelevant matter is more direct."

Lightfoot vs. People, 16 Mich. 507.

In the trial for criminal assault alleged to have been committed by sham marriage, it was not competent to show that when defendant was married nine months later, he obtained his wife by abduction.

Lee vs. State, 44 Tex. Cr. App. 354, 72 S .W. 1005.

In a prosecution for burglary, it was error to permit the State to prove another burglary by defendant on the

same night and immediately before the commission of the alleged burglary, for which defendant was on trial.

"The fact that appellant commits one crime is not legal evidence of the fact that he committed another. It could only serve, as appellant says, to prejudice the jury against him, could throw no light upon the transaction, does not serve to show criminal intent; nor does the fact that he burglarized one house render it probable in contemplation of law that he burglarized another, unless it be upon the theory of proving his character, and thereby render probably the commission of the crime on trial. This is not permissible under any rule of law."

Hill vs. State, 73 S. W. 9 (Tex.)

In criminal prosecutions, it is the duty of the court to prevent the introduction of evidence that would support a charge against the respondent of which he is not appraised under the pretext of its affording some presumption of his guilt of the offense that is the subject matter of the indictment. It is not permissible to prove a felony that has no connection with another by reference to the one that the defendant is being prosecuted for.

State vs. Smalley, 50 Vt. 736.

In State vs. LePage, 57 N. H. 245 (24 Amer. Rep. 69) defendant was indicted for the murder of a young girl, who was killed while passing over a certain road on her way to school. Her body had been cut in different parts, some of which, her head, had been found a quarter of a mile away, and another portion had been cut out and carried away and was never recovered. The theory of the prosecution was that the defendant had assaulted and violated the person of the deceased, and then murdered her, either in the commission of the former crime or afterwards. Upon the trial it was proved by several witnesses

that the prisoner, about the time of the murder, was frequenting that neighborhood with a view to the commission of the crime of criminal assault upon the person of some one of the young females whom he knew to have occasion to pass over that road. This evidence was held to be competent. The prosecution was also permitted to prove at the trial, by the sister of the wife of the defendant, that about four and one-half years before the trial, at a place beyond the jurisdiction of the United States, the defendant committed the crime of criminal assault upon her. It was held that the admission of such evidence was error because it violated the fundamental principle of law that evidence that the defendant committed one offense cannot be received to prove that he had committed another. The claim of the prosecution was that the respondent killed the deceased in perpetrating, or in attempting to perpetrate a criminal assault upon her, and as having some tendency to show that he committed or attempted to commit a criminal assault upon the deceased, the State was permitted to show that four years and more previous he had committed criminal assault upon the witness in Canada. The question was, has the testimony any such tendency? There was obviously no connection whatever between the two offenses or transactions, either in persons upon whom the crimes were committed, or in the places, or times when committed. The evidence of the witness, at most, would only show that the respondent was depraved enough to commit the crime of criminal assault. The court proceeded to reason as follows and stated that:

"It was not claimed that the defendant killed the deceased to enable him to commit the assault. The assault preceded the killing and the killing was done to conceal the assault. To illustrate, suppose the defendant had

committed only the crime of assault upon the deceased and then had spared her life. No case can be found that would authorize the State upon the trial of an indictment against the defendant for criminal assault to give in evidence a criminal assault committed upon another person more than four years previously; that no case of a more marked and distinct offense as to time, place, victim and circumstances can be found and such evidence does not become any more relevant when the trial is upon an indictment for killing while committing the assault.

State v. LePage, 57 N. H. 245, 24 Am. Rep. 69.

1 Wharton, Criminal Evidence. Sect. 29. "Collateral facts generally irrelevant. One of the fundamental provisions of the Federal and State constitutions is that the accused shall be informed of the nature and cause of the accusation. To admit evidence of such collateral facts would be to oppress the accused and try him on charges, of the nature and cause of which he has not been informed, and which he has made no preparation to meet, and by prejudicing the jury against him, through the publication of offenses of which, even if guilty, he may have long since repented, or which he may have long since condoned. Trials would thus be injuriously prolonged, the real issue obscured and verdicts rendered on collateral issue." . . . . . .

Sect. 29-a. The reason is, the irrelevant facts have been placed before the jury by innuendo, the sinister influence remains, nor is it destroyed by exclusion. It rationally follows, therefore, that the jury has been prejudiced against the accused as fully as though the irrelevant facts themselves have been admitted, and nothing that the court can say can entirely obliterate the facts.

Sect. 30. "Proof of collateral offenses not admissible. As has been stated, there are peculiar reasons why the test should be applied to proof of collateral offenses. A defendant ought not to be convicted of the offense charged against him simply because he has been guilty of another offense. Hence, when such evidence is offered

simply for the purpose of proving his commission of the offense on trial, evidence of his participation, either in act or design, in commission or preparation, in other independent crimes cannot be received. This rule obtains strictly, however, only where proof is offered of such independent offenses to show that by reason of such independent offense, the accused is more likely to have committed the one for which he is on trial. The rule is that evidence of such collateral offense must never be received as substantive evidence of the offense on trial; and it extends to the proof of the accusation of another crime, as well as to evidence of its actual commission."

Sect. 32. . . "In any loose relaxation of the rule the danger to the accused is that, evidence may be adduced of offenses that he has not yet been called upon to defend, of which, if fairly tried, he might be able to acquit himself. The collateral offense for which he has not been tried, first of all tends to prove his tendency towards crime, that is, to render more probable his guilt of the charge under trial, which is an absolute violation of the rule. It does not reflect in any degree upon the intelligence, integrity, or the honesty of purpose of the juror, that matters of a prejudicial character find a permanent lodgment in his mind, which will, inadvertently and unconsciously, enter into and affect his verdict. The juror does not possess that trained and disciplined mind which enables him either closely or judicially to discriminate between that which he is permitted to consider and that which he is not. Because of this lack of training, he is unable to draw conclusions entirely uninfluenced by the irrelevant prejudicial matters within his knowledge. Indeed a knowledge of the extraneous facts, disclosed on examination, disqualifies the juror, if shown to be prejudicial, and such facts coming to his knowledge after his acceptance does not lessen the harm.

A man may fully recover from the effects of judicial tribulation, where it effects only his property or material interests. But recovery from the effects of a charge that involves his reputation and character, and that threatens

his liberty or his life, is a recovery only in name. Absolute acquittal cannot completely restore him to the place be once held. The stain of prosecution cannot be eradicated. These momentous consequences demand a rigorous enforcement of the rule in criminal charges, that evidence of the collateral offense must never be admitted, unless the exception can be applied to more certainly demonstrate the truth."

Sect. 52. "Judgments of conviction have frequently been set aside because of the conduct of counsel for the prosecution in stating and insinuating other offenses than the one for which the accused was on trial, either in argument, or by repeatedly asking rejected questions and commenting on what the answers would have been if allowed."

Sect. 53. "In many instances the court have properly admitted evidence of another crime, it being competent for a certain purpose, and then neglected to instruct the jury that the evidence must be considered by them only for that purpose, and by reason thereof the conviction has been reversed. And in Texas it has been repeatedly held that a failure on the part of the court so to instruct the jury is reversible error, even when such instruction is not requested. But where the nature and circumstances of the case were such that the jury could not possibly have applied the evidence to any other purpose than that for which it was properly admitted, a failure to instruct will not be considered prejudicial error.

"When evidence of a separate, independent crime has been improperly introduced, and it is apparent that the effect of its reception must have been to prejudice the rights of the accused, a charge to the jury to disregard the evidence will not cure the error in admitting it.

Sect. 61. When a defendant has voluntarily put his character in issue, it is not competent nor relevant to the issue, to admit in rebuttal on the part of the prosecution evidence of a series of independent facts, each forming a constituent offense. Rebutting evidence of bad reputation is, however, always admissible.

2. Bishop on Criminal Procedure.

Sect. 1113. "The particular trait of character, which the indictment impugns, probably by all opinions may be given in evidence in the defendant's favor. And it is widely deemed that the inquiry should be limited to such trait; it being said to the obviously irrelevant and absurb, on a charge of stealing, to inquire into the prisoner's loyalty; or, on a trial for treason, to inquire into his character for honesty in his private dealings."

Sect. 1120. "The State cannot prove against a defendant any crime not alleged, either as foundation for a separate punishment or as aiding the proofs that he is guilty of the one charged, even though he has put his character in issue."

The case of State vs. Hyde, 234 Mo. 200, 136 S. W. 316, was a trial for murder, by poison, of Col. Thos. S. Swope. The prosecution introduced on the trial, in order to prove intent and motive, evidence that the defendant was responsible for the death of Col Hunton by excessive bleeding while treating him for apoplexy, Chrisman Swope's death by poison; that the defendant innoculated the Swope household with typhoid germs; that he attempted the life of Margaret Swope by injecting into her arm what he supposed were diphtheria germs, and also by poison administered in the form of medicine. Defendant was a physician. The death of Col. Swope occurred on Oct. 3, 1909, the death of Col. Hunton occurred on Oct. 31, the death of Chrisman Swope occurred Dec. 6th. The members of the Swope household were attacked with typhoid during the month of Dec. 1909. Held, where a physician was accused of murder by administering a poisoned capsule, evidence that he administered to others capsules containing the identical poison and with the same effect is admissible to show intent; but, where the post mortem of the deceased person for whose death he

was on trial showed the presence of strychnine and cyanide, and the post mortem in the other case failed to show cyanide and only showed a trace of strychnine, evidence of the last transaction is not admissible, for the fact that defendant gave to others a capsule containing a different poison would not tend to obviate the possibility of mistake or accident in the first case. The Court says:

"The question of the admission of testimony of other crimes alleged to have been committed by defendant is a serious one, and of first importance in this case. The testimony admitted concerning other crimes imputed to the defendant makes up the major part of the record, and without regard to its probative value, is of a character to powerfully impress a jury against the defendant.

"In objecting to this testimony, the defendant invokes the settled rule that, upon the trial of a defendant on a specific charge, evidence of other crimes committed by him is not admissible. This rule, firmly established in English and American Jurisprudence, has been recognized and adhered to by this court in numerous cases. A man may be a notorious criminal, but this fact may not be shown to influence a jury in passing upon the question of his guilt or innocence of the particular offense for which he is on trial. A may have committed many crimes, and still be innocent of the crime charged in the case on trial. To permit proof of other crimes would naturally predispose the minds of the jurors against the defendant. One who commits one crime may be more likely to commit another; yet, logically, one crime does not prove another, nor tend to prove another, unless there is such a relation between them that proof of one tends to prove the other. Unless such a relation exists it is illegal and manifestly unfair to require a man, who is charged with a specific crime in the indictment, to prepare a defense against other crimes that the state may attempt to prove against him, but which are not charged in the indictment. * * * *

"The claim that defendant attempted to poison Sarah Swope, by handing to Stella a capsule with a request that

she ask the nurse to give it to Sarah, and the further claim that he inoculated them both with typhoid by giving them candy, are neither one supported by any evidence worthy of consideration. According to the expert testimony in this case, the percentage of fatalities in typhoid fever does not exceed 2 per cent. in 50. The defendant, knowing this fact as a physician, would not be likely to select typhoid fever as a direct instrument of murder. To meet this situation, the State advances the theory or suggestion that 'it would serve as a mask and cover for deaths that might be otherwise produced' (State's brief); in other words, afford an opportunity to poison the typhoid patients. **This theory of the State concerning germ innoculation is built upon a series of inferences, without any substantial underlying basis of fact.''**

The pertinency of the above statement to the case at bar lies in the fact that it is the theory of the State in this case that Frank murdered Mary Phagan to silence her because of having committed, or attempted to commit on outrage, and, as evidence of this, Conley was permitted to testify as to other acts of the defendant with other women at other times. In these other acts, however, the State has produced no testimony of outrage or attempted outrage. It is, in the language of the Court in the Hyde case, ''a theory built upon a series of inferences upon inferences without any substantial underlying basis of fact.''

CONLEY'S TESTIMONY CONTINUED.

(Grounds Nos. 12, 13 and 14, pages 6, 7-51, Motion for New Trial).

This negro Conley was a star witness, and in addition to the instances of preversion testified to by him in grounds Nos. 10 and 11, he testified to five other occasions whereat Frank's conduct with women at the pencil fac-

tory clearly indicated adultery. Each of these occasions occurred long before the killing of Mary Phagan. One of them was on Thanksgiving Day in 1912. Each of the other four occasions occurred upon Saturday afternoon, the nearest in time to the murder being near New Year's day, 1913. In neither was Mary Phagan in any way involved; nor did either of them bear the remotest relationship to her murder. If the negro told the truth, Frank's escapades upon Thanksgiving and the four Saturdays, were coarse, lecherousness with women other than Mary Phagan, and without a single link binding them with Mary Phagan's death.

Whether Frank did, or did not commit adultery with the various women connected with these transactions, throws not a ray of light upon the Phagan murder. The subject of these women, and Frank's connection with them, was lugged into the case for one purpose only, that purpose being to blacken, degrade and prejudice Frank in the minds of the jury.

That the desired effect was obtained no sane man can doubt. If the negro's testimony was true, Frank was coarse, perfidious, brutal and lecherous. He was using the office of the company, his place of trust, to betray his wife and debauch the girls under his influence and employment.

Concede that the jury believed this of Frank, and how easily they could be persuaded that he was guilty of murder. Logically, of course, no such result followed, but juries are not always logical, and this evidence of baseness upon Frank's part would have inevitably influenced them, even if the Court had instructed them to the contrary.

When the Court admitted the testimony for their consideration without any warning or direction as to the use that could be made of it, inevitably they made of it the use most dangerous to Frank. Indeed, there was no other purpose that such evidence could serve. The court submitted it to them for some purpose, and naturally they

applied it to the only use of which it could be remotely made.

That this evidence was inadmissible as an original proposition can hardly be doubted. It was subject to the objection made at the trial that it was irrelevant, immaterial, illegal, detrimental, and dealt with other matters and things irrelevant and disconnected with the issues on trial.

The discussion and the authorities cited on the grounds of the motion Nos. 10 and 11, supra, will not be here repeated, but the discussion there had is appropriate hereto, and the authorities there quoted are conclusive as to the inadmissibility of this evidence.

It is contended, however, that this testimony was admitted without objection; that the motion to exclude it was not made until after cross-examination had been made of Conley as to all of Frank's alleged dealings with women, except as to the acts of perversion referred to in grounds Nos. 10 and 11, supra.

This contention is not entirely accurate. When the witness Conley was first asked with reference to Frank's conduct with women at times other than the day of the murder, defendant objected, on the ground that the evidence sought would be immaterial. The court ruled that such evidence would be immaterial. After this ruling of the court the Solicitor-General brought out by direct testimony the transactions here objected to.

After the court's ruling, and after such direct testimony had been brought out by the Solicitor, the defendant cross-questioned the witness in an effort to modify or explain his direct evidence.

While Conley was still on the stand, the defendant moved to rule out, withdraw and exclude from the jury,

the whole of Conley's testimony, direct and cross, with reference to Frank's conduct with women, at times and places, other than the time and place of the murder.

The defendant, as will be seen (grounds Nos. 12, 13 and 14), made three efforts to take this testimony from the jury.

He first moved to exclude all the testimony of the witness Conley that he watched for Frank at the pencil factory at four times on Saturday long before the day of the murder, and once on Thanksgiving Day, 1912, while Frank was with women in his office.

Again he sought (See Ground No. 13) to withdraw from the jury every question and answer of Conley's dealing with this conduct of Frank with other women. To that end he made a written motion setting out every question and answer of the negro Conley, dealing with such conduct, and moved the court to rule out, withdraw and exclude from the jury each and all of such questions and answers. This motion was declined, and the court in doing so passed the following order:

"When the witness Conley was still on the stand, his testimony not having been finished, the defendant by his attorneys, moved to rule out, withdraw and exclude from the jury each and all the above questions and answers because the same were irrelevant, immaterial and prejudicial and dealt with other matters and things irrelevant with the issue of this trial. After hearing argument of counsel, the court overruled the motion to rule out, withdraw and exclude said above stated questions and answers from the jury, but permitted the same to remain before the jury."

That no default should be charged to the defendant in his effort to rule out this testimony, he again sought to exclude and withdraw it from the jury (see Ground No. 14), by moving the court to exclude it, setting up in narra-

tive form all of this testimony of Conley's, direct and cross, dealing with other transactions and moving the Court to withdraw and exclude it from the jury, for the same reasons above stated, and the Court again declined.

Conceding as an original proposition the inadmissibility of this testimony, is the defendant estopped in his attack upon it because he did not press to the limit his original objections to the testimony, and did not move to exclude it until after the cross-examination of the witness?

That the objection was timely made is not disputed. The contention is that the objection ought to have been promptly followed up to the exclusion of the testimony.

It is not at all certain that this is so. When the defendant objected, and his objection was sustained, defendant's duty was at an end. It was the business of the Court, and not the defendant, to see that the ruling of the Court was obeyed. Objections to testimony are often a delicate matter. Persistent objections often lead to ruin. It was enough to charge the defendant with the invocation, the additional burden of enforcing respect for the Court's ruling ought not to have been placed upon him. The difference between overruling objections and not enforcing a sustained objection, is very small. Indeed to the defendant it makes no possible difference whether the Court overrules or sustains an objection if the sustained objection is not enforced. In common sense, if not in law, evidence is admitted over objection if the sustained objections are not enforced, in substance the evidence was heard over the objections of defendant, for an unenforced objection is the equivalent, in substance, of an objection overruled.

The present record shows an objection,—a judgment of the Court sustaining that objection,—and in spite of

that objection a full disclosure of the testimony objected to.

This Court must, of necessity, conclude that the Court, at least, tacitly and impliedly, withdrew his judgment. For it will not be presumed that the judgment of the Court stood and was flagrantly disobeyed by the Solicitor-General. On the contrary, this Court will presume that the evidence was introduced in the first instance over the objection of the defendant and with the consent and acquiesence of the Court. If such is the case, then this evidence was originally introduced over the defendant's objection.

If otherwise, the motion of the defendant to withdraw the testimony from the jury was timely made. In the nature of things it can never be too late to rule out illegal testimony. Legal testimony, and only legal testimony, can be the basis of a just verdict. And it can never be too late to avert the legal calamity of having a verdict based upon illegal testimony. The quality of illegality is inherent in the testimony itself. If testimony is illegal in relation to the issues in dispute it will be none the less so if it creeps into the case without objection, or if it violently breaks in over objection. The manner by which testimony gets into the case does not change its nature from legal to illegal. If the testimony is illegal it is a foreigner and an alien, and has no place in the case, and it will not undergo a process of naturalization by the mere fact that it creeps into the case without objection. It will poison the verdict just the same whether it sneaks in unawares or bounds over the barrier in spite of the guards.

This Court is committed to the doctrine that it is never too late to exclude illegal testimony until the case is finally submitted to the jury. Indeed this Court has gone to the extent of holding that if the parties are silent it is

within the province of the Court himself to withdraw illegal testimony, or to direct the jury to disregard it.

In the case of Columbus Railway Co. vs. Christian, 79 Ga., page 61, a number of witnesses were introduced by the plaintiff tending to show, not by general reputation, but by proving that he had had a number of altercations and disputes with a number of persons, that Dickinson the agent of the railroad company, was a dangerous man.

It does not appear that any objection was made to this testimony, but it does appear that a motion was made to rule out all this class of evidence, on the ground that it was irrelevant for the purpose of showing the dangerous character of defendant's agent. This Court held that the motion to rule out ought to have been granted.

During the progress of the case of Blount v. Bell, 95 Ga., page 198, the witness testified that her uncle, interstate, was well off and that he left considerable property. This testimony was not objected to at the time, but the defendant afterwards moved to rule it out on the ground that it was not competent to prove the means or worth of the deceased. The Court below ruled that this could not be done inasmuch as the testimony had come in without objection.

This ruling of the Court below was reversed by this Court, saying: "A motion to rule out testimony illegally admitted, even without objection, is never too late until the cause is finally submitted to the jury. If the testimony is illegal it should not be considered by the jury, and if it is not to be considered by the jury it should not be admitted for their consideration. The admission of illegal testimony at the instance of one party does not justify the admission of illegal testimony at the instance of the other. The law recognizes no such thing as an

equation of errors, and the true remedy is when an error is committed to correct that by doing what is right, and not see kto excuse it by the commission af another error."

In the case of Suttles v. Sewell, et al. 117 Ga., page 215, the defendant Sewell testified to statements made to him by Gammage several days after the sale, then in dispute, tending to show that there was an understanding between him and the plaintiff that Gammage should bid on the property at the sale for the sole purpose of delaying the sale, and he also testified to similar statements made by the defendant's husband subsequent to the sale, and this evidence was corroborated by Mrs. Sewell the wife of the defendant.

The record does not show that any objection was made to the introduction of this evidence.

This Court in speaking of this evidence said:

"But we are clear that it is inadmissible, and therefore it had no probative value. . . . . Although there was no objection to this testimony it was merely hearsay and therefore, not evidence. It was illegal and inadmissible under any view of the case, and eve nif admitted was of no probative value. Claflin v. Balance, 91 Ga. 412;

In the case of Minnesota Lumber Co. v. Hobbs, 122 Ga. 22, this Court states the contention thus:

"If irrelevant evidence be admitted without objection it can have no probative value in the determination of the case which the court and jury are called up to decide by the issues raised by the pleadings of the respective parties."

In the case of Bradley v. The State, 121 Ga. 201, it was held:

"Where irrelevant testimony was not objected to, it is not improper for the court to instruct the jury that such

irrelevant testimony should be disragerded in passing on the real merits of the case.''

In discussing this principle on page 207, the Court says:

''One of the witnesses for the State testified, without objection, that he had also had prescriptions calling for whiskey filled at other drug-stores in Newnan. In view of this testimony, which the jury might otherwise regard as of some moment, the court very properly instructed them that what other druggists in that city or elsewhere had done would not make what the defendant had done either lawful or unlawful. It was not, as insisted by counsel for the plaintiff in error, incumbent on the judge, of his own motion, to rule out this testimony as irrelevant, rather than to caution the jury to disregard the same in passing upon the real merits of the case.''

In the case of McCalman vs. The State, 121 Ga. 496, after the introduction of evidence, and during the argument of counsel for the State, the accused, by his counsel, moved to rule out the testimony of the prosecutrix that the bastard child, of which the accused was alleged to be the father, ''was just like him,'' on the ground that it was irrelevant and inadmissible. The trial court overruled this motion.

This Court held the motion to rule out is not too late if made before the case is finally submitted to the jury. Blount v. Bell, 95 Ga. 182.

In he case of Zipperer v. City of Savannah, 128 Ga. 138, the Court refused to permit the plaintiff to withdraw from the consideration of the jury an ordinance of the City, conferring upon the employees of the Savannah, Florida & Western Railroad Company the usual powers of police officers. This Court sustained this refusal of the Court below, upon the ground that the ordinance of-

fered was relevant, as tending to establish the contention of the defendant.

In its discussion of the matter, this Court said:

"When a party voluntarily introduces competent and relevant testimony which is favorable to his adversary, he is not entitled, as a matter of law, to withdraw it from the record. 2nd. Elliott Gen. Prac. Section 593. A witness who has delivered testimony hurtful to the party introducing him, can not be withdrawn, but if the party has been entrapped by the witness the law permits his impeachment by the party introducing him. Civil Code, Section 5290. The rule is different when the testimony is neither legal nor relevant. Where illegal or irrelevant testimony has crept into the record of the case it is always in order to withdraw it. Salter v. Williams, 10 Ga. 187. Davenport v. Harris, 27 Ga. 68."

In Salter v. Williams, 10 Ga. 186, it is held that it was competent for the Court to withdraw from the jury the consideration of evidence which had been illegally admitted, though no objection had been made thereto.

Plaintiff having testified in chief without objection, and been cross-examined, and before plaintiff came off the stand, defendant's counsel in the case had objected to her competency and to her testimony and asked to have the same stricken because the objection had not occurred to him the day before, it was held that in fairness to counsel and to promote the administration of justice, the motion should prevail and the objection should have been sustained. Saetell v. Met. Life Ins. Co., 81 Mo. App. 509.

In Boyer v. Pac. Mutual Life Ins. Co. 81 Pac. 671, it is held that the Court's duty is not confined to passing on such portions of the testimony as may be objected to, but extends to the preservation of the rights of the parties and the proper disposition of the controversy, and hence the fact that certain inadmissible papers were at-

tached to a judgment offered in evidence were not objected to, did not deprive the Court of the power, on its own motion, to refuse to admit such papers as a part of the evidence.

In Cheney v. Notchkiss, 79 Conn. 104, it is held that it is in the discretion of the Court to exclude, of its own motion and without formal objection, evidence offered for the purpose of discrediting a witness.

In Beers v. Payment, 95 Mid. 261, N. W. 886, it is held that it is not improper for the trial court, in some circumstances, and of its own motion and without the request of counsel, to reject incompetent or irrelevant testimony.

In First National Bank v. Home Ins. Co., 33 Ore. 234, 52 Pac. 1055, it is held that where improper evidence was introduced, that it was not error for the court **sua sponte** to withdraw the testimony from the jury at the close of the trial.

In Vaughn v. State, 130 Ala. 18, it is held, the Court, of its own motion, may at any stage of the trial exclude illegal evidence.

In Jarvis vs. State, 138 Ala. 131, The Court may, of its own motion, strike out improper evidence at any time before the jury retires.

People v. Trucott, 65 Cal. 126, 3 Pac. 461. Irrelevant evidence may be excluded by the Court, though not objected to by counsel.

People v. Goldenson, 76 Cal. 328, 19 Pac. 161. It is not error for the court, on its own motion, and with or without objection from the prosecution, to exclude portion of depositions on behalf of the defense which are hearsay.

Smith v. State, 25 Fla. 517. Where illegal testimony

has been admitted, it is the duty of the court to strike it out.

McClure v. Commonwealth, 81 Ky. 448. Conviction on larceny, the defendant being under fourteen, will be reversed for the failure of the trial court, of its own motion, to exclude evidence that the defendant's mother kept a house of ill-fame and that his brother was a bad character.

State v. O'Connor, 65 Mo. 374. In a criminal case, improper evidence must be excluded, whether objected to or not.

State v. Douglas, 15 Mo. App. 1. The Court should exclude improper evidence offered by the State in a criminal case, though no specific objection has been made to it.

State v. Brantley, 84 N. C. 766. That on the spur of the moment evidence should be admitted as to the existence of a fact bearing no relation to the main fact, or such a relation as could only afford grounds for a conjecture on the part of the jury, can be withdrawn entirely from their consideration.

Parker v. Smith, 4 Cal. 105. One of the witnesses testified to a state of facts which proved to be wholly inadmissible, and it is held that the Court could order the testimony of the witness to be stricken and instruct the jury to disregard it, though no objection was made by the opposite party and though he had cross-examined the witness.

Illegal or irrelevant evidence may, on motion, be excluded from the jury at any stage of the case:

Pearsall v. McCarthy, 28 Ala. 110;
Poole vs. Beavers, 30 Ala. 672;
Wilborn v. Odell, 29 Ill. 456;
Creed v. White, 30 Tenn. 549.

Pa. Mining Co. v. Brady, 42 Mich. 260. A motion to strike out irrelevant testimony when made before the case is given to the jury is not too late, though admitted without objection, and witness cross-examined by opposing party.

Spottswood v. Spottswood, 4 Cal. App 711, 89 Pac. 362. The failure to object to a question asked a witness does not preclude the court from striking out evidence that it deems improper.

See Patton v. Bank, 124 Ga. 974, for distinction between illegal and secondary evidence.

Penn Gas. Co. v. Cook, 123 Pa. 130. Where evidence has been improperly admitted without objection, the only remedy is by motion to strike it out.

It is not error to sustain motion to strike out illegal evidence made after all the evidence is in, though it was admitted without objection. Phosphate Co. v. Stanford, 112 Ala. 493; In re: Losak, 131 N. Y. 624.

Wendt v. Ry. Co., 57 N. W. 226. Refusal to strike incompetent evidence held to require reversal, though no objection made at time.

Babcock v. Murry, 69 Minn. 199; Achilles vs. Achilles, 137 Ill. 589. Cross-examining a witness as to illegal evidence which he has been allowed to give does not waive the right to have the evidence stricken on motion.

A motion is not too late even after all of the evidence has closed, if it be in fact illegal:

Galveston Rwy. Co. vs. Scott, 18 Tex. (Civ. App.) 321;

Edisto Phosphate Co. vs. Stanford, 112 Ala. 493.

Irrelevant evidence may be stricken by the Court at any stage of the cause:

Hull vs. State, 65 Ga. 38;
Montfort vs. Rowland, 38 N. J. Eq. 181;
Durant vs. Lexington Coal Co., 97 Mo., 62, 10 S. W., 484;
People vs. Wilson, 141 N. Y., 185, 36 N. E., 230;
First Nat. Bank, vs. Home Ins. Co., 33 Ore. 234, 52 Pac. 1055;
Jenkins vs. State, 35 Fla. 737, 18 So. 182
In re: Losak and other cases, 131 N. Y. 624;
Thompson vs. State, 12 Ga. App. 202 (4);
Herrington vs. Razor Co., 6 Ga. App. 861;
Davenport vs. Harris, 27 Ga. 68.

"Objection must be made at the time that illegal testimony is being offered, or a motion made to rule out such testimony as is legally inadmissible, and error assigned upon the ruling of the Court on such motion."

Williams vs. State, 7 Ga. App. 33.

"We are all agreed, therefore, that the only evidence upon which the conviction of the defendant rests was illegal and inadmissible, and that, if a timely objection had been offered, or if a motion had been made to rule it out, the evidence of the defendant's possession of a concealed pistol . . . . . should have been excluded."

Davis vs. State, 4 Ga. App. 318.

TESTIMONY OF LEACH AND OWENS.

(Grounds 37 and 89, pages 68 and 106, Motion for New Trial).

Mary Phagan on the day of the murder came to the city from her home on what is known as the English Avenue car. Just what time that car reached the city

became a matter of extreme importance. Matthews, the motorman, and the conductor swore it reached Marietta Street and Broad Street at 12:07 its schedule time.

The State insisted that Matthews was mistaken and that his car reached the city on the day of the murder a few minutes ahead of time.

In support of its theory the solicitor over the defendants objection in cross-examination proved by Leach (see Ground 37) that he had seen street car men come in ahead of their schedule, that last week he suspended a man for being six minutes ahead, that he would suspend as quick for being behind as he would be for being ahead of time, that frequently crews came in ahead of time and are demerited and suspended for it, that crews are some times ahead of time when they are to be released, that it frequently happens the English Ave. cars cut off the River and Marietta cars and that when there is a procession in town it makes the crew anxious to get through town.

For the same purpose, and over objection the State proved by the witness Owens (ground 89) that he ran on Route No. 8 of the street railroad, White City to Howell Station, that he was due in town at 12:05, this being ahead of Cooper Street and English Avenue schedule two minutes, that he has known the English Avenue and Cooper Street cars to get to the junction of Marietta and Broad Streets ahead of his car, that the English Avenue car is due there at 12:07 and his schedule at 12:05, that he has known the English Avenue car to get there as much as two minutes ahead, thus making the English car come four minutes ahead of time, that he has known this to occur after April 26th, but that he dont know whether it occurred prior to that time.

There is lack of relevancy as to this testimony, as to each of these witnesses. Owens testimony deals wholly

with transactions occurring after the murder. Whether the English Avenue car scheduled for Broad Street at 12:07 got there on time April 26 was the issue. When it got there on any other day after April 26th was of no possible moment; that a given car broke its schedule after a given date in no way illustrates whether it did or did not break it at any given prior date.

Leech's testimony is none the less irrelevant. He does not pretend that he has ever seen Mathews ahead of time or that he has ever suspended or demerited him. Nor does he pretend that the English Avenue car reaching Broad Street at 12:07 was ever ahead of schedule whether in charge of Mathews or some one else.

He does say that the English Avenue car often cuts off the Marietta and River cars, but the schedules of the Marietta and River Cars are not given. Nor does it anywhere appear which one of the schedules of the English Avenue car cuts off the River and Marietta car. Nor does it appear whether this cutting off occurred before or after April 26th.

Grant everything Leach says and no light is thrown upon the issue, when did the 12:07 English Avenue car on April 26th reach Broad Street.

That many other men have gone ahead of schedules on other days and on other routes, and on other schedules and were fined or demerited for it would throw no light on the question at issue. Nor would the fact that some car on some hour of the day on the English avenue car came in ahead of time before or after April 26th give any aid to the jury in determining when the 12:07 car of that line reached Broad Street.

Indeed it was not important when Matthews got to Broad St. on any day except the 26th, not at any hour except the noon schedule.

This evidence was not admissible even under the Flannagan case, 82 Ga. 580 and that was an extreme case.

In that case evidence was admitted showing the high speed at which the same engine was habitually run by the same engineer at the same place and that he habitually neglected to ring the bell.

Neither of these witnesses came up to the rule in that case.

There was no suggestion that this motorman and conductor running the same car on the same schedule and at the same place were habitually ahead of time.

Indeed neither Leach nor Owens prior to April 26th ever saw Matthews ahead of time on any car nor at any time nor at any place.

In discussing this Flannagan case this Court in the Railway Co. vs. Smith, 94 Ga. 107 says:

"This Court sanctioned the admission of evidence showing that the high speed at which the same engine was habitually run by the same engineer at the same place; but Chief Justice Bleckley said it was of doubtful admissibility, and besides there is some difference between proving habitual acts of negligence or negligence at particular times an dplaces, and of proving the general character of a particular person for recklessness and the contrary."

The habit or practice of the plaintiff in departing from cars on other occasions, either before or after the injury complained of is not admissible for the purpose of illustrating his conduct at the particular time under investigation.

Atlanta C. St. R. R. vs. Bates, 103 Ga. 333.

This Court in the case of Central R. R. vs. Ross, 107

Ga. 73, granted a new trial because the Court below permitted a witness to testify:

"They killed a good many stock out in that way, they killed the mules and cows. It has not been a year since they killed a mule right below where they kill mine."

In this case the Flannagan case was again distinguished.

In the case of East Tennessee Railway Co. vs. Kane, 92 Ga. 187, this Court held:

"It was not error to refuse to allow the defendant to show the common experience of railroads in getting back switch keys from their discharged employees, and that all railroads have great difficulty in keeping up with such keys and having them returned by discharged employees because of their real or alleged loss."

In the case of Newsom vs. Railway Co., 62 Ga. 339 it was sought to prove the length of defendants trains on a certain day by the average length of trains at that time of the year.

Chief Justice Warner said:

"The admission of this evidence was error, the question was what was the length of defendant's train of cars on that day, and not what was its average length at that season of the year. Besides there were witnesses that saw the number of cars on defendants train that day, and their evidence was of a higher grade than McLaughlin's and therefore the best evidence in relation to that point in the case. The Plaintiff was entitled to a legal trial of his case whatever may be its merits."

The habit to act hastily and heedlessly upon other occasions is not sufficiently relevant to be admissible in evidence.

Central Railway vs. Ryles, 84 Ga. 120.

In a suit by reason of a derailment and overturning of a car which the plaintiff was in, evidence that another car of the defendants was over-turned upon a near-by but different track three months prior to the time the plaintiffs injuries were received was not relevant to prove negligence of the defendant at the time and place alleged in the petition.

Central R. R. vs. Duffey, 116 Ga. 346.

Evidence that a man had previously built another staging that fell was not admissible to show his incompetency.

Kennedy vs. Spring, 35 N. E. 779.

(1) "In an action for personal injuries, testimony as to the plaintiff's habits or notoriety is inadmissible to contradict direct testimony that he was intoxicated at the time of the accident."

(2) Nor is such testimony admissible to contradict evidence brought out in cross-examination that he had been several times intoxicated before the accident.

Car vs. West End St. Ry. Co., 163 Mass. 360,
40 N. E. 185.

Justice Holmes in speaking of the latter testimony, says:

"The latter testimony was immaterial and the plaintiff was not entitled to contradict it. McCarty vs. Learn, 118 Mass. 509; Shurtleff vs. Parker, 130 Mass. 293-7; Lamagdelaine vs. Tremblay, 162 Mass. 339; Alexander vs. Kaiser, 149 Mass. 321 Harrington vs. Lincoln, 2 Gray 133."

Carr v. West End St. Ry. Co., **supra.**

This evidence was prejudicial to the defendant. It was extremely important to show that Mary Phagan did not reach the factory before 12:10.

Monteen Stover, a witness for the State testified that she reached the factory at 12:05 and stayed there 5 minutes; that Frank was not in his office when she reached the factory and was absent therefrom when she left at 12:10.

The State strenuously insisted that Mary Phagan reached the factory before the witness, Monteen Stover and that while the latter was waiting for Frank he was committing the crime.

The defendant on the contrary insisted that Mary Phagan reached the factory after Monteen Stover left.

The exact time therefore when Mary Phagan reached the factory was of the greatest moment.

The witness Matthews and his conductor swore positively that Mary Phagan on their car reached Broad Street at 12:07. The undisputed evidence was that, assuming that fact, Mary did not reach the factory until Monteen Stover had left it.

This point was hotly contested and the State sought by this testimony of Leech and Owens and by the testimony of Hendricks, McEwen, Ingram and Hoffman below considered to refute the direct testimony of Mathews and his conductor.

The testimony of the kind here and next below criticised was neither incidental nor accidental. It was supported by six witnesses. The jury was impressed by its very mass and its wordy weight. The Court sanctioned, emphasized and made it, in the hands of the solicitor, a powerful weapon against the defendant.

TESTIMONY OF HENDRICKS, McEWEN AND HOFFMAN AND INGRAM.

(Grounds 50, 51, 52, 88, pages 82, 83, 105, Motion for New Trial).

The evidence of these last two witnesses was of the same degree and character as that of the witnesses Leech and Owens.

The witness Ingram (ground 88) makes only one allusion to the witness Matthews and none to his conductor. He says, "I knew the motorman Matthews, I have seen his car ahead of time, I could not say how often."

When he saw the car whether day or night he does not say, nor when, whether before or after, April 26th.

The witness, Hoffman (ground 52) has only this material matter to say about Matthews, "Prior to the beginning of this trial, I have known Matthews car to cut off the Fair Street car. Under the schedule of the Fair Street car it arrives in the center of town, junction of Broad and Marietta at 12:05. At this time Matthews was running ahead of this Fair Street car which is due at 12:05 at the junction of Marietta and Broad Streets, the Fair Street car would be on its schedule.

. . . . . I called Matthews attention to running ahead of time, once or twice that I know of."

He does not pretend that Matthews ran ahead of time on April 26th, the material matter under investigation, nor indeed that he ever ran ahead at any time prior to the 26th of April. The trial was not had until months after that time. The witness only fixes the time as before the beginning of the trial.

The witness McEwen (ground 51) had only this to say about Matthews.

"I do not know that the car, that Matthews and Hollis was running, did come into town ahead of time very often, especially if it was on a relief trip. I have known it to be four or five minutes ahead of time."

When the car was ahead of time, day or night, before or after the 26th of April does not appear.

The witness Hendricks (ground 50) is a little more definite he says ,"Prior to April 26th the English Ave. car with Matthews and Hollis on it did run to Broad and Marietta Streets ahead of time, how much ahead I can not say positively. About April 26th and subsequent thereto Matthews and Hollis in charge of the English Avenue car, about twelve o'clock when they were due to get off at dinner did come in ahead of time. I have seen them two or three minutes ahead of time."

But this evidence is too indefinite to be of any evidential value. There is no statement that prior to April 26th, 1913, Matthews on the schedule in dispute was ahead of time.

Certainly there is no suggestion of habit that would bring the evidence within the rule in the Flannagan case.

The real question was and is, When did Matthews reach Broad Street on the noon schedule on April 26th, 1913? When he got there on any other day or on any other schedule was of no importance. Evidence as to other lines and places were immaterial.

The evidence of all these witnesses was admitted over oft-repeated appropriate objections. That it was inadmissible as an original substantive evidence can hardly be disputed.

Nor can its introduction be justified upon the theory that it was admissible for the purpose of impeaching the witness Matthews.

As to Leach and Owens (grounds 39 and 89) nothing

they said contradicted Matthews in any matter at all material to this case and their testimony must stand or fall upon the question as to its materiality as original substantive evidence.

It is, however, earnestly insisted that neither of these witnesses said anything that contradicted Matthews as to anything material to his testimony and the case.

Matthews did testify that he was on schedule time 12:07 on April 26th, 1913, and that, while he had been behind time, he had never been ahead of time, that the Company punished for being ahead of time, and that he had never been punished by demerits or suspension.

It is also true that some of these witnesses did contradict him as to being ahead of time, but such contradiction did not reach the dignity of impeachment.

Whether Matthews was ever ahead of time at other times and places was wholly immaterial and in such immaterial matters there could be no impeachment.

A witness cannot be impeached because of a discrepancy as to a wholly immaterial matter. Impeachment must be had as to matters material and relevant.

Mann vs. State, 124 Ga. 760.
Tucker vs. Central R. R. Co. 122 Ga. 387;
Luke vs. Cannon, 95 Ga. 538;
Evans vs. State, 95 Ga. 468;
Kenley vs. State, 9 Ga. App. 219;
Miller vs. State, 9 Ga. App. 603;
McCarthy vs. Leary, 188 Mass. 509;
Shurtleff vs. Parker, 130 Mass. 293-7;
Harrington vs. Lincoln, 2 Gray (Mass.) 133;
Carr vs. West End St. R. R., 163 Mass. 360, 40 N. E. 185.

DALTON'S TESTIMONY.

(Grounds 21 and 22, pages 58-59, Motion for New Trial.)

The Court permitted a witness named Dalton to testify that he made a series of Saturday visits to Frank, at his office in the pencil factory; that he made these visits, usually, in company with a woman named Daisy Hopkins; that it was his custom, after visiting Frank, to visit the basement of the pencil factory in company with this woman; that these visits to the basement were known to Frank; that whether or not Frank knew of the purpose of his going to the basement he did not know; that when he made these visits to Frank, he found him in company with women—sometimes one and sometimes two; that Frank, during these visits, furnished to the women refreshments, including beer.

The defendant objected to this testimony, when the evidence was offered, and before cross-examination, that it was irrelevant, immaterial, illegal, and dealt with other matters than the issues on trial, and was prejudicial to the defendant's case.

These objections of the defendant were overruled, and the evidence went to the jury unrestricted at the time of its introduction or in the charge of the Court.

The Solicitor-General, in his closing argument to the jury, insisted that this evidence of Dalton, not only corroborated Conley in his testimony as to the immoral conduct of Frank (see grounds 12, 13 and 14); but, was independent evidence as to immoral conduct on the part of Frank.

This testimony of Dalton threw no light upon the Phagan Murder, nor, indeed, was it intended to do so. The purpose of its introduction was to present a series of facts to the jury from which they might infer that, at various times during the summer and fall of 1912, Frank

was guilty of acts of adultery at the pencil factory, as a means of blackening, degrading and prejudicing him before the jury.

None of the events testified to by Dalton were proximately related to the Phagan murder in point of time. There was no pretense that Mary Phagan was one of the girls participating in the escapades referred to by Dalton. In the evidence nowhere is the slightest suggestion that any of the Dalton events were in the remotest degree related to the present trial.

This evidence did not explain, nor elucidate, the murder; it was not introduced for that purpose. On the contrary, it was introduced for the two-fold purpose of, first, showing independent acts of immorality against Frank, and, second, for the purpose of giving weight to Conley's statements that Frank had been guilty of other acts of immorality, which were also wholly unrelated to the Phagan murder.

The Solicitor-General made no concealment of this purpose from the jury; indeed, he urged upon the jury that this testimony of Dalton showed that Frank was guilty of immoral conduct, and that it gave weight to Conley's charge of other acts of immorality.

That these and similar acts of immorality on the part of Frank were inadmissible have been fully covered, supra, in the discussion of Conley's testimony. A full list of authorities has been given, and will not be here repeated.

It will hardly be contended that this testimony was not prejudicial to the defendant. The Solicitor-General recognized its hurtful power, when he contended in his argument that this testimony, together with Conley's established beyond controversy Frank's depravity and corruption.

Its baneful effect upon the jury can hardly be estimated. Frank was in charge of a factory employing a large number of young girls. If not his duty to protect them, it was certainly his duty not to soil them with his own hands and to keep their work-shop clean from brazen, tippling women.

Failure to do so would not to the legal mind be evidence of murder, but such failure would greatly prejudice the lay mind. Belief in the moral corruption that Dalton's testimony suggested, would be but a short mental step from belief in Frank's guilt as a murderer.

The strength of the defense ought not to have been exhausted in defending Frank from these independent, disassociated acts of immorality. The jury's mind ought not to have been perplexed in the decision of Frank's morality or immorality. These disgusting issues ought to have been swept out of the way, leaving the jury to employ all their mental strength and acumen in justly deciding the issue of murder. Perplexed with this testimony of Dalton, while the jury found a verdict of murder, it is not at all certain that they did not really find a verdict of immorality. The real issues in this case demanded the undivided mental strength of the whole jury.

It will be borne in mind that this testimony of Dalton, and the testimony of Conley, were admitted in evidence by the State before any evidence was presented by the defendant.

CONDUCT IN OTHER TRANSACTIONS.

(Grounds 43, 47, 57, 58, 59 and 78 of the motion; pages 71-80-86-100 Motion for New Trial.)

The Court permitted the Solicitor, over the objections of defendant, that the same was illegal and im-

material, to prove various, specific incidents of misconon the part of Frank, independent of and disconnected from the Phagan murder.

(Grounds 43 and 78.)

The witness Irene Jackson was permitted to testify that a young lady by the name of Emilie Mayfield was in the dressing-room of the factory, in the process of undressing, and that Frank came to the door, looked in, smiled and walked out; that, at another time, Frank went into the dressing-room when a sister of the witness was lying down with her feet upon a table or stool; that she heard the girls at the factory talk about Frank going into the dressing-room on two or three different occasions.

(Ground 47.)

Over the same objections, the Court permitted the witness Turner to testify, as follows:

"I saw Frank talking to Mary Phagan on the second floor of the factory about the middle of March. Frank was talking to her in the back part of the building. I do not know whether anybody was in the room besides Mr. Frank and Mary. After I went in there, two young ladies came down and showed me where to put the pencils. Nobody was in there but Mr. Frank and Mary at the time I was in there. Mary was going to her work when Mr. Frank stopped to talk to her. Mary told him that she had to go to work. Mr. Frank was talking about he was the Superintendent of the pencil factory and that he wanted to speak to her, and she told him she had to go to work, and I never did hear any more replies from either one. I left just when she told him that she had to go to work. Mary backed off and Frank went on towards her, talking to her. That was before I left, was when she backed off, and the last words I heard him say was he wanted to talk to her. Mary did not stand still; she moved

backward about three and one-half feet. While she was going backwards, Mr. Frank was talking to her and walking towards her. Mr. Frank said: 'I am the Superintendent of the pencil factory and I want to speak to you; and Mary said: 'I have got to go to work'."

(Ground 57.

Over the same objections, the Court permitted the witness Dewey Hewell to testify, as follows:

"I am now staying in the Station House. Before I came to Atlanta to testify, I was in Cincinnati, Ohio, in the Home of the Good Sheperd.

"I worked at the pencil company during February and March, 1913. I quit there in March. I worked on the fourth floor and I worked in the metal-room, too. I have seen Mr. Frank hold his hand on Mary's shoulder. He would stand pretty close to her when she was talking to him—would lean over in her face."

(Ground 58.)

Over the same objections, the Court permitted Miss Myrtice Cato, one of the girls of the factory, to testify that she knew Miss Rebecca Carson, a fore-lady in the factory; that she had seen her go twice into the ladies private dressing-room at the factory with Leo M. Frank.

(Ground 59.)

Over the same objections, the Court permitted the witness Maggie Griffin to testify that she had seen Miss Rebecca Carson go into the ladies private dressing-room with Frank—sometimes in the evening and sometimes in the morning—during working hours. "I saw them go in and come out during working hours."

All of these grounds deal with transactions other than the murder of Mary Phagan. It is difficult to see how Frank's conduct in going into the dressing-room where there were girls of the factory, either dressed or un-

dressed, can throw any light upon the mystery of the Phagan murder. Equally as remote, to the issues on trial, was the dispute as to whether or not, Frank and Miss Carson went alone into the ladies private dressing-room. Even if Frank did talk familiarly to Mary Phagan, as testified to by Turner, or had been indiscreet enough to put his hand upon her, as testified by Dewey Hewell, neither act would have any tendency to show that he thereafter murdered her.

It is axiomatic that such conduct in other and different and independent transactions is inadmissible, whether such conduct does or does not amount to crime. The rule is the same. They are excluded, because they prejudice the defendant and confuse the jury, by multiplying the issues. Indeed, other crimes are excluded, not because they are crimes, but because they involve conduct in other transactions, disconnected with the conduct involved in the trial issue.

The same argument and authorities that exclude other crimes will, likewise, exclude other and different transactions. The authorities as to other crimes are set out supra, and need not be repeated here.

It is clearly apparent that the evidence of these witnesses was exceedingly prejudicial to Frank. If the jury believed that he thrust himself into the dressing-room of these little girls; that he was making the private dressing-rooms of the factory a place of assignation; that he had been unduly familiar, by act and words, with Mary Phagan, what chance would he have before the average jury to a fair and impartial trial? Their resentment at his conduct would becloud their judgment, and they would speedily find him guilty of murder, not because he was, in fact, guilty of murder, but by reason of his dirty conduct.

CONLEY'S PRESENCE AT FACTORY. NOT REPORTED TO POLICE.

(Grounds of Motion 16, 23 and 27, pages 55-60-63, Motion for New Trial.)

Mrs. White was the wife of one of the employees of the pencil factory. On the day of the murder—Saturday, a holiday—most of the employees were absent from the factory; but Mrs. White's husband, was engaged in doing special work, upon the fourth floor. One Harry Denham was, also, engaged in this work on the fourth floor. In leaving the factory, near one o'clock on that day, Mrs. White saw a negro sitting near the stair-way on the entrance floor of the factory.

Over the objections of the defendant, the Court permitted evidence as to the time when this incident came to the notice of the Atlanta Police.

(Ground 16.)

Over the objection of defendant that the same was irrelevant, immaterial, and not binding upon Frank, the Court permitted Mrs. White to testify that Arthur White, her husband, and Campbell were both connected with the pencil factory, and that she never reported seeing the negro in the pencil factory until May 7, 1913.

(Ground 23.)

Over the same objections, the Court permitted the witness S. L. Rosser to testify that, since April 26, 1913, he had been engaged in connection with this case; that he visited Mrs. Arthur White subsequent to April 26, 1913; that the first time the witness ever knew that Mrs. White

saw the negro, when she went into the factory, was somewhere about the sixth or seventh of May, 1913.

(Ground 27.)

Over the same objections, the Court permitted the witness Scott, who was one of the Pinkerton Detectives employed by the Pencil Company, to testify that he first communicated Mrs. White's statement about seeing a negro on the entrance floor of the pencil factory to Chief Lanford and Bass Rosser, and that the information was given to the detectives on April 28, 1913.

The evidence in these three grounds ought not to have been heard against Frank. No default on the part of Mrs. White in reporting Conley's presence to the Police could be charged against Frank. True, she was the wife of Arthur White and Arthur White was an employee of the Pencil Company; but that fact does not charge Frank with Mrs. White's default, no matter what Mrs. White did, nor what her husband, Arthur White, did. It could not be charged to Frank, unless he was in some way connected therewith. Nor is Frank chargeable with witness Scott's delay in reporting this White-incident to the Police. Scott was not the employee of Frank, but the employee of the Pencil Company. Had he been the employee of Frank, his default in this matter would not be chargeable to Frank, unless Frank, in some way, occasioned it. He not only did not occasion it, but the undisputed evidence is that he told this incident to Scott on Monday after the murder. 12 Cyc. 420. Gaines vs. State, 99 Ga. 704.

The admission of this testimony was hurtful to Frank. The Solicitor, in his address to the jury, contended that Mrs. White and her husband, an employee of the factory, was concealing evidence from the police, and

that such concealment was evidence of Frank's guilt.

The Solicitor further contended that Harry Scott, who was one of the Pinkerton Detectives employed to ferret out the crime by Frank, acting for the National Pencil Company, did not promptly inform the officers of Mrs. White's seeing this negro, and that his failure to do so was evidence of Frank's guilt.

True, this testimony apart from the argument of the Solicitor, might not have been hurtful; indeed, in the absence of such argument, the evidence might not have been greatly impressed upon the jury's mind. But, pointed and poisoned as it was, by the Solicitor's argument, it was extremely hurtful to the defendant.

Perhaps nothing so prejudices a jury as the suggestion that testimony has been suppressed, that the defendant is seeking to darken the issues by concealment. The Solicitor adroitly used this evidence, suggesting to the jury darkness and concealment, and thereby aroused their prejudices against the defendant.

CONFRONTING FRANK WITH CONLEY.

(Grounds 15, 17, 28 and 39, pages 55-63-69, Motion for New Trial.)

Immediately after the murder, Frank was placed in the County Jail and remained there until the trial, some months later. After the negro Conley had confessed to his part of the Phagan murder, Chief of Police Beavers, Chief of Detectives Lanford, and Detective Scott, with Conley, went to the jail and asked the Sheriff if they could see Frank. The Sheriff said: "I will go and see, and, if he is willing, it is all right". The Sheriff went to Frank and said: "Mr. Frank, Chief Beavers, Chief Lanford and Detective Scott, and Conley, want to talk to

you, if you want to see them." Frank replied: "No; my attorney is not here, and I have got nobody to defend me; my lawyer is not here, and there is no one here to listen to what might be said".

This statement appears in Ground No. 17 of the motion. Substantially the same evidence is objected to in Grounds 15, 28, and 39.

The objected evidence, as outlined in ground 17, is the basis of the present argument. The objections set up in Grounds 15, 28, and 39 are not abandoned. The discussion here made is equally appropriate to all these grounds.

Frank was in jail; his counsel was not present, but was in a distant county; the Chief of Police, the Chief of Detectives, Detective Black and Detective Scott, and the negro Conley, without any warning to Frank, demanded an interview.

This was declined by Frank because his counsel was absent and there was no one present, in his interest, to report what might be said.

This decision was a wise one. These detectives—all of them—were bitterly prejudiced against Frank. All of them, including Scott, who had been employed by the Pencil Company, were vying with each other to see who could excell in activity against him. They wanted a dirty, lazy, impudent, ignorant negro, under their encouragement, approbation and supervision to vilify, upbraid and accuse Frank. With what result, these, his enemies, were to be the sole judges. Under this police protection, this vile negro could, and would, have insulted him at will, and to the hurt of Frank, no matter what position he took. Had he restrained his outraged feeling, there would have been no doubt of his guilt. His very calmness would have been sure proof of his conscious guilt. Had

righteous indignation asserted itself, his guilt would have been equally certain. He would have been damned if he did; and he would have been damned if he didn't.

He would have no more chance than a dove thrown into a cage of hungry cats. This negro, under this police protection, would have been insolent beyond endurance; and this white man, guilty or innocent, would have been hopelessly and pitiably helpless; he would have been forced to stand the filth and shame of this negro, and, whether he did it calmly or defiantly, his guilt would have been certainly established.

Even if Frank had been at liberty, we think he could have declined an interview with the detectives and this negro, without exposing himself to the charge of guilt by the state.

What they wanted was to force Frank into a verbal conflict with this negro.

Surely he could have declined, without criticism, such a conflict. This negro's impudence, under police protection, would have been unbearable, and his declining the interview could not, in fairness, be attributed to a consciousness of guilt. Much rather ought it to be attributed to a senses of decency and self-respect.

But Frank was not at large; he was in jail, and in a cell in the jail. So incarcerated, he was entitled to the privilege of silence. It cannot be said that a prisoner must, at his peril, open his cell to every comer, and that it must be a common meeting ground for every vagabond who wishes to accuse him. The law is not tyrannical enough to cage a man, tie him to the four corners of a room, and then force him, at his peril, to hear the abuse of the whole community.

The prisoner, until after conviction, is held by the law, not by reason of guilt but as a necessary inconveni-

ence pending the determination of his guilt or innocence.

During this incarceration, he is entitled to the law's courtesy and protection; it permits him, without censure or suspicion, to select his visitors and to speak, or to be silent, just as he may see fit.

Incarceration is itself a continuing query, if not an accusation by the whole people. In the the face of this query or accusation the prisoner may safely keep silent, and when a few of the people take it upon themselves to accentuate this general query or accusation, no reason is presented why the prisoner should speak at his peril. The whole includes the many, and when the whole accuses it is not material that a few see fit to accuse upon their own behalf.

In the case of Graham v. State, 118 Ga. 807, Lamar, J., said: "When declaration pointing to the guilt of defendant are made in his presence, and under circumstances which ordinarily render it expedient and proper for him to make reply, and with full opportunity to explain, he says nothing in denial or explanation, the fact of his silence may be admitted for consideration by the jury. But where he has been arrested, and nothing is said to him or in his presence, calling for denial, the mere fact that he says nothing, should not be used to his prejudice. And to permit an argument based thereupon, but emphasized the error in admitting the testimony. If the defendant on trial stands mute, or fails to make the statement permitted by the statute, this can not be made the basis of comment by the Solicitor General. (Civil Code, Section 937); Robinson v. State, 82 Ga. 535. The law does not favor convictions based upon confessions, and least of all upon implied confessions."

"Before the sayings of a third person, made in the presence of one who is subsequently charged with the commission of a criminal offense, should be admitted in evidence against him, there should be proof affirmatively disclosing that the circumstances were such as to call

upon the accused to make some response to what was said in his presence. The circumstances must require an answer or denial, or other conduct, before silence will amount to an implied admission."

Lumpkin et al v. The State, 125 Ga. 24.

In speaking of acquiescence by silence and conduct, Judge Warner, in Rolfe vs. Rolfe, 10 Ga. 146, says: "Nothing can be more dangerous than this kind of evidence. It should always be received with caution, and never ought to be received at all unless the evidence is of direct declarations of that kind which naturally call for contradiction; some assertion made to the party with respect to his right, which, by his silence, he acquiesces in."

"Before testimony tending to show an inference of guilt is admitted to the jury as an implied confession arising from silence when an incriminating statement is made, it should affirmatively appear that such statement was addressed to the defendant, or that he was physically near enough to hear and understand the statement, and that (at the time and place when and where made), it required from him an answer or denial."

Jones vs. State, 2 Ga. Appeals, 433.

"Where a defendant, while under arrest, is charged with the crime by an accusation made in his presence and hearing, and he remains silent or unequivocally denies it, his silence or denial is not admissible in evidence against him; but if, before arrest, he remains silent when statements are made to him or questions asked which naturally call for a reply if he is innocent, proof of his conduct is admissible."

"Where a defendant, while under arrest, is charged with the crime by an accusation made in his presence and hearing, and makes an equivocal reply, the question or statement by which it was elicited, and the answer or comment, are admissible."

Commonwealth vs. Spiropoulou, 208 Mass. 71,
94 N. E. Rep. 451.

Judge Bradley, in the case last cited, in discussing the matter, on page 452 says:

"If a defendant while under arrest is charged with the crime by an accusation made in his presence and hearing, and he remains mute or unequivocally denies it, his silence or denial is not admissible in evidence against him. But if he makes an equivocal reply, the question or statement by which it was elicited, and the answer or comment, are admissible. Com. v. Kennedy, 12 Metc. 235, 46 Am. Dec. 672; Com. v. Walker, 13 Allen 570; Com. v. Brown, 121 Mass. 69, 80; Com. v. McDermott, 123 Mass. 440, 25 Am. Rep. 120; Com. v. Trefethen, 157 Mass. 180, 197, 198, 31 N. E. 961, 24 L. R. A. 235. We place to one side other evidence introduced by the government, that Mantir's conduct and false statements before his arrest tended to show his connection with the murder. It was said by Chief Justice Field in Com. v. Trefethen, 157 Mass. 180, 199, 31 N. E. 961, 968, 24 L. R. A. 235: 'To argue that by the other evidence the defendant is shown to be probably guilty, and that therefore his denial of guilt is false, and is additional evidence against him, ought not to be permitted.' The distinction is that before arrest, if he remains silent when statements are made to him or questions asked, which naturally call for a reply if he is innocent, proof of his conduct is admissible. But when under arrest he is not called upon to speak, and what he may have said or done while only under suspicion cannot be used as a reason from which to infer that proof of his silence raised a presumption of his guilt. Com. vs. Kenney, 12 Metc. 235, 46 Am. Dec. 672; Com. v. Galavan, 9 Allen 271; Com. v. McDermott, 123 Mass. 440, 25 Am. Dec. 120; Com. v. Coughlin, 182 Mass. 558, 565, 66 N. E. 207."

In case of Ripley v. State, 58 Tex. Cr. App. 489, 126 S. W. Rep. 586-587, Davidson, P. J., speaking for the court says:

"A bill of exceptions recites that while the witness Dollins was testifying in behalf of the State, and having testified that he went to the residence of appellant some hours after the killing and informed appellant that they

had come to arrest him, and that he was city marshal at the time, and was accompanied by the constable and two policemen,, the state then propounded to the witness the following question: 'Q. Without stating anything that he said, did Mr. Ripley make a statement to you at that time?. A. No, sir.' Appellant objected to the question and answer, on the ground that appellant was under arrest, that the testimony was improper, illegal, and prejudicial, and moved the court to exclude from the jury the question and answer for the reasons stated. The court overruled these objections, and permitted the question and answer to go to the jury as evidence in the case. We are of opinion that this was error. See Gardner v. State, 34 S. W. 945; Simmons v. State, 50 Tex. Cr. R. 527, 97 S. W. 1052; Wright v. State, 37 Tex. Cr. R. 627; 40 S. W. 491; Fulcher v. State, 28 Tex. App. 465, 13 S. W. 750; Denton v. State, 42 Tex. Cr. R. 427, 60 S. W. 670. Silence of a defendant under arrest cannot be used as evidence against him."

"Evidence that after defendant's arrest a statement of a third person connecting him with the murder was read to him, and that he said nothing, is not admissible against him as an admission; the officer in charge cautioning him that he was not required to speak, as anything he said might be used against him, and telling him that the statement was to inform him of the nature of the evidence against him. "

People v. Young, 76 N. Y. Supp. page 275.

"It was error to allow the marshal to testify that, after he arrested defendant for burglary, he questioned him as to the ownership of certain property, and that the defendant replied that he 'had not a word to say'; as the refusal of a person in custody to answer questions which might be prejudicial to him cannot be introduced against him."

Denton v. State, 42 Tex. Cr. App. 427, 60 S. W. Rep. 670.

In discussing the question on page 672, Brooks, Justice, speaking for the court says:

"By bill No. 4 appellant insists that the court erred in permitting the city marshal of McKinney,—Ben Burks,—after he had arrested defendant, to testify that he asked him this question: 'Denton, whose property is that?' and to which defendant replied, 'I have not got a word to say.' In Gardner v. State, Tex. Cr. App. 34 S. W. 946, we said: 'Appellant stated to the sheriff that he was at several places on the night of the homicide. If this statement was true, his presence at the place of the homicide was very improbable. Being under arrest, the sheriff took him to those places, and the persons doing business at those places stated to the sheriff in the presence of appellant that appellant was not there at the time he told the sheriff he was. Appellant made no reply to these statements. All that the sheriff did, all that these persons who resided at the places named by appellant to the sheriff stated, and the silence of appellant were introduced in evidence against appellant as confessions of appellant to the truth of these statements. Were these facts, and especially the silence of appellant, competent evidence? They were not * * * A person who is held in custody on a charge of crime is not called upon to contradict statements prejudicial to him, made in his presence, by another person, in answer to inquiries made by an officer; 'and such statements, though not contradicted by him, are not admissible in evidence against him'."

"One who is held in custody on a charge of crime, and confined in the cell of a lock-up, is not called upon to contradict statements tending to implicate him in the crime, made in his hearing by another person to an officer of the law; and such statements, though not contradicted by him, are not admissible in evidence against him."

Commonwealth v. Gilman S. Walker & Another,
95 Mass. 570.

Commonwealth v. Kenney, 12 Metc. 235.

"Where a person is in custody for a crime, his silence cannot be used against him, as a confession of the truth of statements made in his presence, whether he was cautioned as required by the statute, or not."

Gardner v. State, (Tex. Cr. App.) 34 S. W. 945.

"The silence of a party under arrest, when charges or accusations are made against him, ought not to be allowed to raise any inference against him."

State v. Epstein, 25 R. I. 131, 55 Atlantic Rep. 204.

"Statements of the deceased to the effect that the accused had fired the first shot, and had attempted to murder him, without cause or excuse, were allowed to be repeated to the jury, over the objection of the accused, because these statements had been made in the presence and hearing of the accused, and had not been contradicted by him. The rule is that hearsay evidence is inadmissible. The exception to this rule in favor of uncontradicted statements does not extend to cases where the accused was under arrest when the statements were made."

State v. Carter, 106 La. 407, 30 Sou. Rep. 895.

In the case of Commonwealth v. Dennis McDermott & Another, 123 Mass., 441, Soule, J., speaking for the court says:

"The defendant Malone, while held in custody, had a right to keep silence as to the crime with which he was charged, and all circumstances connected with it, and was not called upon to reply to or contradict any statements made in his hearing. No inference against him was warranted by his failure to deny the truth of what McDermott said to the officer. Commonwealth v. Kenney, 12 Met. 235; Commonwealth v. Walker, 13 Allen, 570. The conversation between the officer and McDermott was therefor inadmissible against Malone, and he was entitled to the ruling asked for. The learned judge who

tried the case erred in submitting to the jury the question whether the silence of Malone was an admission of the truth of the answer of McDermott."

"Mere silence or failure by one under arrest for crime to deny or explain statements against him made in his presence is not admissible as admission of their truth."

State of Iowa v. Weaver, 57 Iowa 730, 11 N. W. Rep. 675.

"A witness on the stand cannot be permitted, over the seasonable objections of the accused, to testify to what another person had TOLD him touching circumstances of the arrest of the latter, although such person stated in presence of the accused, who was then in actual custody, and the latter did not contradict him, and remained silent. The prisoner had a right to remain dumb. The subsequent declaration of the trial judge, in his charge to the jury, that they were not to infer guilt from such silence, could not cure the illegal reception of the testimony. The trial judge was as unable as the appellate court is to know what effect the unauthorized evidence produced on the minds of the jury."

State v. Estoup, 39 La. Am. 906, 3 Sou. Rep. 124.

"In a prosecution for burglary, conversations in the presence of the accused while he was under arrest and after he had been warned that his statements would be used against him are not admissible in evidence against him, his silence not amounting to an admission."

Simmons v. State, (Tex. Cr. App.) 97 S. W. 1052.

In the case of State vs. Diskin, 34 La. Am. 919, 44 Am. Rep. 449, Fenner, J., speaking for the court says:

"Implied admissions from the tacit acquiescence of the defendant in the statements of others made in his presence only result when the circumstances are such as afford him an opportunity to act or speak, and would

naturally call for some action or reply from a person similarly situated. Mere silence, while a party is held in custody under a criminal charge, affords no inference whatever of acquiescence in statements of others made in his presence. He has the undoubted right to keep silence as to the crime with which he is charged, and is not called upon to reply to or contradict such statements. Under such circumstances, it is held that the statements so made are not admissible against the prisoner, because they do not even tend to support the hypothesis of acquiescence. Comm. v. McDermott, 123 Mass. 440; 25 Am. Rep. 120; Comm. v. Kenney, 12 Metc. 235; Comm. v. Walker, 13 Allen, 370; Bob v. State, 32 Ala. 560; Whart. Cr. Law par. 696."

In the case of Bob v. State, 32 Ala. 563, Walker J. states the rule as follows:

"The implications of admissions from silence rests upon the idea of acquiescence. That maxim is, 'qui tacet, **consentire videtur**;' and it never applies, unless an acquiescence in what is said can be presumed. Neither reason nor law will permit the presumption of acquiescence to be drawn from the silence, unless the circumstances were not only such as afforded the party an opportunity to act or speak, but such also as would properly and naturally call for some action or reply from men similarly situated. Fuller v. Dean, 31 Ala. 634; i Greenl. on Evidence par 197; Cale v. Lincoln, 11 Vt. 152; Mellen v. Andrews, 1 Moo. & Mal. 336."

While there are perhaps physicial precedents where the jailed prisoner's silence has been used against him, this Court has not, with the question directly presented, permitted his mere silence to be used against him. In reason and justice his mere silence ought not to be used to his hurt. He is already under the accusation of the whole people. The fact that some one of the public sees fit to add a personal to the general accusation, does not demand a reply.

In the instant case no accusation was made in Frank's presence. His only offence was that he declined an interview between certain police officers and a negro witness. This interview was sought under circumstances that did not require Frank to grant it. Indeed it was sought under circumstances that any decent, self-respecting man would have declined to grant it.

That Frank had the right, legally, to refuse this interview no one will deny. Why should the exercise of an indisputable legal right be introduced in evidence against Frank? Why should the Solicitor General be permitted to proclaim the exercise of this right as evidence of guilt?

MINOLA McKNIGHT.

(Grounds 49 and 68, pages 82 and 94, Motion for New Trial.)

A colored woman, Minola McKnight, was the cook for the father and mother-in-law of Frank. Soon after the murder, she went to the office of the Solicitor General at his instance and made a statement of what she claimed to know.

This statement did not suit the State's attorney and the city detective force, and they determined to get a more favorable statement. To that end, two detectives went to the Selig home, arrested Minola, and carried her to the Solicitor's office. She there declined to add to the statement first made, whereupon, the officers took Minola, screaming with fight, from the Solicitor's office, by means of the police wagon, to the police station, where she was locked in a cell as a common prisoner.

There she was kept until the evening of the next day. At that time, she made another statement, saying, among other things, "that when she left, going to the Solicitor's

office, Mrs. Selig warned her not to talk; that, since the murder, her wages had been raised by the Selig family; and that Mrs. Frank had given her a hat."

On the trial she was asked if Mrs. Selig had not warned her not to talk when she was leaving for the Solicitor's office, and if the Selig family had not raised her wages since the murder; and if Mrs. Frank had not given her a hat. To each of these querries she answered no.

When the denial was made, the Court permitted the introduction of the statement made at the station house, over the objection of the defendant, that such statement was irrelevant and relating to transactions between the witness and the witness with which Frank had no connection.

This McKnight incident was a most disgraceful one. The woman had voluntarily made a statement. The officers and the Solicitor decided they wanted a different and better one. To obtain it, they arrested her, without warrant and in the absence of a charge, and carried her to the Solicitor's office. There she declined to change her original statement, declaring it to be the truth. To force another statement, the terrified negro was taken from the Solicitor's office in the patrol wagon, to the Station House placed in a cell and kept there until she made another written statement meeting the approval of the state's authorities; and then, and not until the permission of the Solicitor was received was she released from prison. No more outrageous wrong was ever committed by the State's officers. Not only was it a wrong to this ignorant negro woman, but a grievous wrong to the whole State. Such conduct might have been expected of criminals, but it is unthinkable that peace officers should look upon it as a praise-worthy achievement.

But apart from its inherent viciousness, it resulted in serious wrong to Frank. Even if Mrs. Frank had given Minola a hat, and Mrs. Selig had warned her, and the Selig's had raised her wages, such acts were not binding upon Frank, and were not admissible against him. He is held responsible only for his own acts; not even the acts of his wife could be charged to him; how much less the acts of his father and mother-in-law?

Ganes vs. State, 99 Ga. 703;
Jones vs. State, 65 Ga. 147.
Knight vs. State, 114 Ga., 928;
12 Cyc, 420.

It is stated in the motion for new trial: "The Seligs and Minola McKnight had been asked, on cross-examination, if these statements in this affidavit were true and had denied that these statements were true."

Even if Minola and the Seligs did deny this statement, when asked, such denial did not make it relevant even for the purpose of impeachment.

"A witness can only be impeached by contradictory statements previously made by him as to matters relevant to his testimony and the case." Code 5881.

"While Green was on the stand as a witness, the Court, over objection of counsel for Hudgins, allowed Plaintiff's counsel to ask the witness questions by which they evidently sought to show that Green had stated to divers persons that the above-indicated substitution of notes and of the mortgaged property had been made with the consent of Hudgins. The witness denied having made any such statements. The court then allowed the plaintiff, over defendant's objection, to prove by several witnesses that Green had told them that Hudgins did consent to the change of notes and mortgages. It is not contended that Hudgins would be bound by the declarations of Green, but it was said that the evidence was admissible

as tending to impeach Green. It was inadmissible for this purpose, as it related to matters not relevant to his testimony or the case. Civil Code, Section 5292. The evidence being inadmissible and of a nature calculated to prejudice the claim of the defendant on one of the controlling issues in the case, the error in admitting the evidence is of a character requiring the granting of a new trial.'' Hudgins vs. Bloodworth & Co., 109 Ga., 198.

"Whether the sexual intercourse was forcible and against the will of the female, or desired by her, could not make a difference in the offense of bastardy. The question in the bastardy case was whether, as a result of the intercourse, the defendant became the father of the bastard child. The contradictory statements which impeach are statements previously made as to material matters; and it being entirely immaterial, as a matter of law, whether the sexual intercourse, if had between the parties, was the result of force, or was engaged in by mutual consent, the statement of the prosecuting witness on a former investigation, as to that phase of the case, could not serve as the basis of an impeachment." . . . . Page 223: "Nothing, however, is better settled than that previously contradictory statements are not affirmative proof of the matters related therein. The previous statements are received solely for the purpose of impeachment, and for no other purpose; and therefore, even if the witness had answered that she testified before the Justice of the Peace that Kennedy raped her, that would not in any sense have proved in fact that Kennedy raped her. As we have stated above, however, the judge ruled correctly, because it was utterly irrelevant to the issue of bastardy whether the intercourse which resulted in the birth of the bastard child was the result of choice or necessity."

Kennedy vs. State, 9 Ga. App. 222.

"Contradictory statements of a witness previously made by him as to matters not relevant to his testimony and to the case, are inadmissible to discredit him. A witness having testified that he was not present at the homicide and knew nothing about it until afterwards in-

formed, is not subject to be discredited by proof of his declarations made after this information was acquired, and tending to show that he had apprehended and given warning of such and such consequences if a certain witness was dealt with in a certain manner."

Futch v. Still, 90 Ga., 472.

A witness may not be impeached by showing that he made a statement not material to the issue.

Green vs. State, 43 Ga., 368.

"In the prosecution of one accused of murder, he was asked if he ever had any trouble with anyone, and answered that he never did. On cross-examination, he was asked if he did not have a dispute with a certain witness, and draw a razor on him and attack him with a pitchfork. **Held**, that this evidence was incompetent, but that, if at all competent on cross-examination, it was irrelevant and immaterial, and the State was bound by defendant's answer, and could not contradict it."

Bullock vs. State, 65 N. J. Law, 557; 47 Atl., 62.

"Cross-examination of a witness in a criminal trial on purely collateral matters, not touched on in the direct-examination, and which have no bearing, direct or indirect, on the issue, is improper."

"A witness cannot be impeached as to matters that are wholly collateral and tend in no way to prove any issue of fact in the case."

State vs. Coyle, (Utah) 126 Pac., 306.

This statement made by Minola McKnight was not relevant to the case. Her full and free admission on direct or cross-examination would not have admitted it in evidence. None of the facts of that statement were relevant against Frank, and whether Minola did, or did not, make them was of no consequence on the question of impeaching either her or the Seligs. False denial as to

irrelevant matters does not detract from legal trustworthiness.

While the Court stated "that he admitted this testimony on the idea that the grounds for the impeachment of Minola McKnight had been laid, the Solicitor treated it as substantive, probative evidence of the facts alleged. He treated it as though the statement of Minola McKnight, made out of court and denied in court, was the equivalent of establishing the facts originally stated. Treating these facts as established, he urged before the jury that they were evidence of the fact that Frank's relatives were seeking to influence this darky. The injustice of such argument is apparent. By illegal arrest and imprisonment, they forced Minola into a false statement. In court, relieved of the false imprisonment, Minola repudiated her former statement. This repudiation, in the mind of the Solicitor, established the fact that Frank's relatives had sought to influence the darky; and, with this supposed evidence as a basis, he charged that Frank, through his relatives, was seeking to influence the witness.

INFORMATION THAT CONLEY COULD WRITE.

(Grounds 26 and 54, pages 62 and 84, Motion for New Trial).

Conley was a negro sweeper for the factory. He was not arrested until Thursday; and the arrest of Frank was made on Monday.

Although Mrs. White had seen some negro at the factory on Saturday, such negro was not identified as Conley.

Although Conley was in jail, suspicion was not really directed against him until several days after his incarceration. He was held because the police willed it, and not because they harboured real suspicion against him.

When Conley was first arrested, he denied that he could write, evidently by reason of the notes found, afterwards, admitted to be in his hand-writing.

This denial served to divert attention, and he was consequently left undisturbed until one Scott, a detective, thought it wise to further develop the question of Conley's writing ability. He made investigation and found, from his operatives investigating while he was out of the city, that Conley could write. This information led to a discovery of Conley's alleged connection with the murder.

During this time, Frank was in jail, and there is no evidence that he knew that Conley had denied that he could write, nor that Conley's ability to write was in question or important to the case.

Nor was there any evidence that the Pencil Company's authorities knew that Conley denied that he could write, nor that his ability to write was material to the investigation. The employees of the factory suspected Conley, and their suspicion was the immediate cause of his arrest.

The Court permitted the witness Scott to testify that "he did not get any information from anyone connected with the National Pencil Factory that the negro could write, but that he got his information as to that from entirely out-side sources, and wholly disconnected with the National Pencil Company. . . . . I got hold of the information about Conley knowing how to write through my operatives that I had investigating while I was out of town. McWorth told me in person when I returned."

This testimony was admitted over the objection that it "was irrelevant, immaterial and not binding upon the defendant."

These objections ought to have been sustained. Whether Scott learned from the Pencil Company authorities, or from outside sources, that Conley could write could not be used against Frank. Even if they knew and concealed Conley's writing ability, it would not bind Frank, unless he was in some way responsible for its concealment. The mere relationship of the officers and employees of the factory was not such a link, so binding them together, as to make their acts Frank's acts, and their knowledge Frank's knowledge.

12 Cyc. 420 and cases cited.

The jury, however, must have understood to the contrary. They naturally thought that the Court had some purpose in admitting the testimony. What purpose he had is hard to imagine, unless he meant for the jury to charge to Frank the knowledge and concealment of the officers and employees of the factory.

The State contended that that was just what he ought to have done, and, in doing it, the Court sanctioned the State's contention and in the presence of the jury.

This was highly prejudicial to the defendant. Not only did the Court yield to the State's contention in admitting the testimony, but the Solicitor, in his argument to the jury, pressed upon it "that the fact that the Pencil Company authorities knew Conley could write, and did not disclose that to the State authorities, was a circumstance going to show the guilt of Frank."

His argument was that, whether Conley could or could not write, was an important matter. The Pencil Company authorities knew Conley could write. They concealed it. Their concealment was, in law, Frank's concealment. Therefore, Frank's concealment is evidence of conscious guilt.

This argument is, of course, fallacious; but, under the circumstances, it will not do to say it was harmless. The Court admitted evidence for the very purpose of furnishing the basis for such an argument. The Solicitor, with the power of the State behind him, placed his argument squarely and solidly upon the basis that the Court had purposely and deliberately furnished him this evidence.

Will it be said that the jury willfully disregarded this action of the Court and this argument of the Solicitor? The presumption is that it gave heed to the Court's judgment in admitting the evidence and were moved to the hurt of the defendant by the argument of the Solicitor. Of course, if the jury purposely disregarded the judgment of the Court and the argument of the Solicitor, the admitted evidence might have been harmless. But who can know that they did? The presumption is that they did not.

GENERAL CHARACTER FOR LASCIVIOUSNESS.

(Grounds 56, 80, 81, 82, 83, 84, 85, 86, 87, pages 85, 103, 104, 105, Motion for New Trial).

After the testimony of Conley, Dalton and others, objected to supra, had been heard in chief by the State, the defendant put his character in issue. He showed by a large number of witnesses that they knew his general character, and that it was good.

The Solicitor, in rebuttal, called about a dozen witnesses, who testified (1) that his general character was bad and (2) that his general character for lasciviousness, —that is, his general character towards women, was bad.

This evidence was admitted over defendant's objection that in this case, a case of murder, defendant's lasciviousness or relation to women was not the trait of

character in issue, and that such evidence in a murder case was illegal, irrelevant, prejudicial and immaterial. Over this objection, the evidence was admitted.

Most likely, under our law, the Court could have restricted, upon proper objection, the defendant's proof of character to his general character for peaceableness, quietness, gentleness and kindred traits.

The rule as to putting in general character does not stand isolated and alone. It exists in connection with, and is limited by, that other cardinal rule that only material testimony can be heard.

Giving heed, therefore, to both these rules, general character is admissible; but, in any given cause, only those traits of general character involved in the crime charged in the indictment.

In a charge of cheating and swindling, a good character for peace would not be involved. The only pertinent inquiry would be: Has the defendant a good character for honesty?

Likewise, in a murder case, good character for honesty would not be involved. Peaceableness and like traits are the qualities therein involved.

In a case of fornication or adultery, character for chastity would be involved, but no such trait would be involved in a charge of murder.

Lascivious men do violate the laws of chastity, or, at least, they often get a general character for so doing, but unchaste men never, by reason of lack of chastity, commit murder. Indeed, ladies-men are not often murderers.

The State, however, made no objections, but permitted the broad question—as to general character—to be asked and answered. The failure to limit the questions as relevant traits of character in no sense broadens the right of

the State in propounding questions to these rebutting witnesses.

There is in this State no equation of errors.
Blount vs. Beall, 95 Ga., 188.

Certain it is that our law gives no justification for unrestrained disintegration of general character into constituent elements.

If it be held that the rule of general character is to stand alone, uninfluenced by the rule of materiality, then, of course, the Court erred.

"The general character of the parties . . . . . are irrelevant, unless the nature of the action involves such character." Code, Sec. 5745.

The first inquiry is as to knowledge of "general character;" the second is; is that character good or bad? Code, Sec. 5882.

There is no direct provision of law as to the proof of any character, except general character; and, unless the rule as to relevancy is also recognized, the restriction is, to general character, as applied to all traits of conduct, and there is no such thing as proof of general character, as applied to only designated or particular traits.

Such a construction of the law would be intolerable. All parties accused of crimes may show their general character. This, the law declares.

But the law, also, declares that only relevant evidence can be heard.

Give these two rules of law each appropriate force, and the composite practical rule is this: All persons accused of crime may give in evidence their general character as to such traits as are involved in, and bear appropriate relation to, the crime of which they are accused.

One accused of murder may show traits involved in murder. Many traits are not involved in murder, and evidence of general character, as to such traits, ought not, t obe heard.

That the accused had a good general character as to generosity, veracity, chastity, loyalty, and many other traits, would give no aid to the jury, and testimony of general character as to such traits will not, and ought not to, be heard.

Cross-examination of character witnesses is restricted also by the rule as to relevancy.

After a witness has testified as to good character, the general rule is that "particular transactions," or the opinions of single individuals cannot be inquired of on either side, except on cross-examination in seeking for the real foundation of the witnesses knowledge.

But this does not mean that any and all particular transactions can be inquired of in seeking for the extent and foundation of knowledge.

It can only mean such particular transactions as are connected with and illustrate the relevant traits. In cases of larceny, particular trails of lasciviousness would illustrate no issue involved; nor would loyalty, generosity and benevolence. The only relevant particulars would be those of honesty or dishonesty. In cases of murder, particular traits of honesty, chastity, benevolence and loyalty would bear no relevancy to the issues involved. The particular transactions there relevant would be those of peaceableness, violence, force, turbulence and the like.

In Dodson vs. State, 136 Ga., 243, the Court says:

"Where the defendant puts his character in issue, it is allowable on cross-examination to ask a witness, called to establish his good character, if the witness upon

a certain occasion came upon the scene immediately after the defendant had made a serious attack with a weapon upon another person, who charged the defendant in his presence with an attempt to kill him.''

The Court, in the opinion, cites Ozburn vs. State, 87 Ga., 173, as sustaining the proposition that a witness, called by the defense to establish his good character, may be interrogated on cross-examination as to his having seen the defendant engaged in a brawl or fight—that is, as to a specific act. The case of Ozburn vs. State, 87 Ga., 173, does not, as we take it, sustain this proposition. That case is authority for the proposition that a witness who had testified to the character of defendant for peaceableness—that he had never heard of defendant having a difficulty before, may be asked, on cross-examination, if he had ever heard of defendant's shooting any-one before, and if he had ever heard of his shooting a man in another State.

This case sustains the proposition that the trait of character involved in a murder trial is the character for peace and violence of the defendant, and not any other trait.

In the case of Moulder vs. State, 9 Ga. App., 438, the defendant was on trial for the offense of selling liquor. He offered evidence of his general character. The Court says:

"On cross-examination of a witness, by whom it was attempted to prove the general good character, State's Counsel asked: 'Do you know the reputation of Luther Moulder, the accused, for selling whisky?' The witness answered: 'I cannot say that I do. It seems to me, and I am not positive—but it seems—I have a faint recollection of hearing somebody say—Just who made the remark, I cannot now recall the name of such person, or who it was that said that Luther Moulder was illegally

selling whisky. I am not positive that I heard anybody make the remark that Luther Moulder was, illegally;—but, it seems I have a faint recollection of hearing somebody say that the defendant had been selling whisky illegally'."

Counsel for the accused objected to the above answer, and the exception to the Court's ruling, in declining to exclude it, was the point in controversy.

In the discussion of the inadmissibility of this testimony, Justice Powell said:

"Say that the accused puts his character in issue. He, of course, produces the first witness. He will not be allowed on direct-examination to ask the witness as to what he has heard particular persons say, but counsel in the examination, and the witness in his answers, will be confined to the general reputation of the accused—that is, his character generally, or, if some particular trait, such as peaceableness or violence, is involved, generally as to that trait. But when State's counsel comes to the cross-examination, he may inquire of the witness as to whom he has heard speak of the accused, as to what these persons said, and then, for the purpose of showing the incorrectness of the witness's statement that his good character which he has ascribed to the accused in general, may inquire if he has not heard particular persons speak ill of him, or if he has not known him to be accused of particular crimes, or of particular acts which would tend to detract from a man's good character in the community."

The suggestion of Judge Powell that any particular crimes or particular acts which would tend to detract from a man's good character in the community, may be asked on cross-examination, is obiter, and is not sustained by the weight of authority, neither in this court nor in the other courts of last resort.

The cases cited by Judge Powell in this case, supra—Ingram vs. State, 67 Ala., 67, and Ozburn vs. State, 87 Ga., 173—do not sustain the proposition that particular transactions and acts, irrelevant to the traits involved in the charge, can be heard on cross-examination. They only go to the textnt of holding that, upon cross-examination, a character witness may be asked if he has heard of accusations against the defendant as to particular facts; these cases do not hold that particular facts, other than relevant facts, could be heard even on cross-examination.

In Brantley case, it is said: "One ground of motion for new trial is as follows: "Because the Court erred in admitting the following testimony of a witness for the State, over objection: "Have you ever heard about Solomon Brantley's character by what others told you? (A) Yes, sir. I was warned by half a dozen or more that I had better be on the watchout, if I ever had any trouble with him to be prepared for him. I heard that he was in the habit of carrying concealed weapons." It was stated that the "defendant objected to this evidence on the ground that it was illegal testimony, because it was going into the details of the difficulty, to-wit, carrying concealed weapons. This is forbidden by law." In the brief of evidence, the direct-examination of the witness contains no statement that he heard that the defendant was in the habit of carrying concealed weapons, but on the cross-examination he testified: "I have never been told by men that he was armed." Held: (a) That the defendant, having put in evidence his character for peaceableness, the State could reply thereto; but it was his general character for violence or peaceableness which could be shown in rebuttal, not hearsay that the defendant had done particular things." ' "

See Brantley vs. State, 133 Ga., 264.

"We fully concede that it is the right of a person accused of crime to put in issue his general character. In examining the witnesses called to establish his character the defendant may inquire of them how long they have

known him, and their opportunities of forming a knowledge of his character. Peeples vs. State, 103 Ga., 629 (29 S. E., 691). But a witness called by the defendant to show his good character will not be permitted on his examination in chief to testify as to particular instances or special traits which do not bear upon the particular nature of the crime with which the defendant is charged. Thus, a man on trial for murder will not be permitted to show his character for industry. State vs. Dalton, 27 Mo., 13. The witness in this case was allowed to swear that the character of the accused was good. The excluded answer was not so positive in its endorsement of the defendant's character as the evidence which was admitted. Testimony that the defendant's general character for peaceableness was good was relevant. But from the form of the question, it seems his purpose was to put in issue his general character, and not his character for peaceableness. If the Court had allowed the witness to answer the question in the manner the witness would have answered it, the effect would have been to allow the defendant to establish his good character from habits of industry, and being respectful to white and black people."

Arnold vs. State, 131 Ga., 494, 496.

"On the trial of a man for a single act of adultery with one of his witnesses, letters written by him previous to the act and a conversation, also previous, had with his wife and his witness when he was not present, all tending to show that he, his wife and his witness, had, several months before the alleged adulterous act, combined to impute to a certain dentist criminal intercourse with the witness and to 'blackmail' or extort money from him, were not admissible testimony in behalf of the state to impeach the witness or illustrate her relations to or with the accsued, she not having been interrogated as to those matters when under examination so as to lay the foundation for contradicting her and there by impairing her credit. The admission of this illegal testimony was highly prejudicial to the accused, as its tendency was to render her odious and in-

famous in the estimation of the jury. It had no relevancy whatever to the alleged criminal act for which he was on trial."

Gardner vs. State, 81 Ga., 144:

The Court says at page 149:

"What the evidence suggested was so abominable that the Court below had to charge the jury in the most elaborate and careful way not to allow it to have any effect upon their minds otherwise than as it bore upon the credit of the girl, Mary L. Hunt. We think it should not have come into the case. Nothing of the transaction with Dr. Smith should have come into the case to illustrate a single act of imputed adultery committed some months afterwards; and we do not know what mischief it may have done.. It is very likely that blackmail was more in sight of the jury and is more in our sight now in this record than adultery. We think the Court erred in admitting the evidence, and that the error is material enough to entitle this party to be tried over. If he is an innocent man, he has no way of showing his inocence but by showing that the witness, Cobb, does not swear truly against him. Any collateral matter that makes his case or himself or his witness odious to the jury interferes with his real defense, and his only defense."

Indictment for murder. The Court says:

"The accused called a witness to establish his character for peaceableness or violence. On cross-examination this witness was allowed to testify that he had heard of the accused whipping the deceased a time or two, over the objection that the testimony was hearsay. There was no error in this ruling. Where a defendant calls a witness to establish his good character, and the witness testifies that from general reputation he regards the defendant's character as good, it is competent on cross-examination to elicit the witness's information of specific instances of conduct tending to disprove the witness's estimate of his character."

Baldwin vs. State, 138 Ga., 349.

In McNab vs. Lockhart, 18 Ga., 495, which was an action for money entrusted to defendant's care, but which was alleged to have been lost. Testimony as to the good character of the defendant for honesty and trustworthiness was rejected by the lower court. This was held to be error and the case remanded on that ground.

Judge Lumpkin says at page 512:

"And whenever a particular trait of character is involved in the matter charged against the defendant, there the character of the party in that particular trait, is put in issue, and may be given in evidence. We cannot doubt but that the character of the defendant, for want of integrity and trustworthiness, was put merely in issue by the action brought against him; and, from the very nature of the case, and the difficulties surrounding it, that character must constitute his main, if not his only, defense. Entire liberty should have been extended to the defendant upon this point. The time will come, and we are fast verging to it, when the administration of justice, both civil and criminal, will turn very much upon the character of the litigating parties, their testimony being mainly looked to for the establishment of the facts upon which the law will pronounce its judgments."

Judge Powell states in McClure vs. State Banking Company, 6 Ga. App., page 303.

"The bank sued McClure on a note made payable to one Turner and indorsed by him to the bank. The defendant claimed that the note was a forgery, and that Turner had committed the forgery. He offered to prove in support of this contention that the general reputation of Turner was very bad, and that he bore the general reputation of having been engaged in the business of commiting forgeries. The Court declined to allow the proof. There was a verdict for the plaintiff, and the defendant excepts to the ruling overruling his motion for a new trial.

"The rule prevailing in England and in most of the American States, that evidence of character is not usually received when offered for the purpose of throwing light on the probability of the doing of a certain act by the person

whose character is in question, is not of force in this State. The contrary doctrine has been recognized in our jurisprudence from a very early date. The Civil Code, Section 5159, provides: "The general character of the parties, and especially their conduct in other transactions, are irrelevant matters, unless the nature of the action involves such character and renders necessary or proper the investigation of such conduct." The rule is especially applicable to, if not confined to, cases where a particular trait of the person whose conduct is under investigation is involved, or the alleged conduct is such that no person of good character would likely commit it. If only a particular trait is involved, the testimony should be limited accordingly."

The Court proceeds then to cite nine Georgia cases, in which character testimony was restricted to the particular trait involved in the case. The opinion then proceeds, as follows:

"In the case at bar, the maker of the note claimed that Turner had forged his signature. Now, if Turner were a man of good character, this fact would have made the defendant's contention very improbable. Unquestionably the plaintiff would have a right to prove that Turner was a man of good character, and it was not even necessary for him to prove this to get the benefit of it in the argument; for there is a presumption, until the contrary appears, that every person has a good character, and this presumption is strong enough to afford a basis for an argument by counsel and for action by the jury. . . . On the other hand, proof that Turner was a man of bad character, and especially that he had the general reputation of being a frequent and notorious forger, would tend to make the defendant's contention that the signature to the note was a forgery more probable. The conduct charged to Turner in the present inquiry was such as to involve his general bad character, and also his special bad character, as we may call it; and the rule limiting the evidence to a par-

ticular trait (Anderson's case, 107 Ga., 506, 33 S. E. 644) was not applicable.

"In this connection it may not be amiss to call attention to the fact that the party offering the evidence of character, good or bad, is confined to generalities, and cannot show special instances or specific acts, though the party cross-examining has this privilege. For example, in the present case, the defendant had the right to show by witnesses, who knew Turner's general reputation, that it was bad; also that he had the reputation, not merely by having committed a single forgery, but of having made a practice of committing forgeries, or that he had the reputation of having committed many forgeries. The plaintiff, on cross-examination, would have had the right to test the extent of the information of the witnesses offered for this purpose, by inquiring particularly as to what they had heard. If the plaintiff, in turn, offered witnesses as to Turner's good character, either generally or particularly in regard to forgeries, the defendant, then, could have cross-examined by asking the witnesses as to what had been said of him regarding particular transactions."

Judge Fish states: "Upon examination it will be seen that the authorities are simply to the effect that, when the nature of this action involves a particular trait of character of a party thereto evidence in reference to such trait is admissible. This is in accord with the general rule that evidence of character, when admissible, should be so restricted as to have some reference or analogy to the trait involved. 5 Amer. and Eng. Enc. L. (2nd Ed.), 856, and cases cited. If, in the present case, the witness McCrary be treated as the defendant, then the evidence to support his general character for truth and veracity was not admissible, because that particular trait of this character was not involved in the assault which the plaintiff contended he made upon Wright.

Anderson vs. Southern Railway Company, 107 Ga., 500, 507.

Action for damages. It was held that where the issue was as to whether the agent of the defendant company

was, generally speaking, a "dangerous man," evidence of his general character with respect to that particular characteristic would be admissible, but that it was not competent for the plaintiff to show by a witness particular acts of violence upon the part of said agent, whose character was under investigation.

Judge Atkinson states:

"In the course of the trial, a number of witnesses were introduced by the plaintiff tending to show that Dixon, the agent of the Company, was a dangerous man, and it was sought to establish this fact, not by a general reputation, but by proving that he had a number of disputes and altercations with different persons; and a motion was made to rule out all of this class of evidence, upon the ground that it was irrelevant, and upon the further ground that it was not admissible for the purpose of showing the dangerous character of the defendant's agent.

"Proof that one is a dangerous man in a general sense involves an inquiry into the character of the person alleged to be dangerous, and any evidence of the existence of a general reputation, which tends to establish such a character would be admissible; but it is not competent for a party who offers a witness for proving general reputation, either to show particular acts of violence, or manifestations of petulance in particular instances upon the part of the person whose character is under investigation. Where it is sought to establish as against a party, or witness, a special general character, such general character must rest largely upon the opinions of witnesses, based upon their observation of the conduct of the individual, and upon the impressions formed upon their minds by reports from other persons touching such character; and while, upon cross-examination, it may be competent to test the value of the opinion of the witnesses by an inquiry into the knowledge of those particular facts upon which his opinion rests, the reputation of the person whose character is under review, must at last be established by general reputa-

tion and not by special acts. As has been well said by the Supreme Court of Pennsylvania, in the case of Frasier vs. Penn. Railroad Co., 38 Penn., St. 110: 'Character grows out of special acts, but is not proved by them. Indeed, special acts do not very often indicate frailities or vices that are altogether contrary to the character actually established, and sometimes the very frailties that may be proved against a man may have been regarded by him in so serious a light as to have produced great improvement of character.' We think, therefore, that if evidence of the reputation of the agent of the defendant company as a dangerous man was material, such reputation could not be proved by particular acts, nor by manifestations of petulence upon particular occasions. See Greenleaf on evidence (15th Ed.), Vol. 1, page 94."

Columbus Ry. Co. vs. Christian, 97 Ga., 56.

Action on an insurance policy. Defendant claimed that the assured had perpetrated a fraud upon the company.

Judge Atkinson says:

"Plaintiff offered to, and did prove over objection of the defendant, that such testimony was irrelevant, the good character of the assured. Error was assigned upon the ruling admitting this evidence. We think it was properly received. Civil Code 5159, provides as follows: 'General character of the parties, and especially their conduct in other transactions, are irrelevant matter, unless the nature of the action involves such character, and renders necessary or proper the investigation of such conduct. . . . And whenever a particular trait of character is involved in the matter charged against the defendant, there the character of the party, in that particular trait, is put in issue, and may be given in evidence. We cannot doubt that the character of the defendant for want of integrity and trustworthiness was put directly in issue by the action brought against him; and, from the very nature of the case, and the difficulties surrounding it, that character must constitute his main, if not his only, defense. Entire liberty should have been extended to the defendant upon this point. The time will come, and we are fast ver-

ging to it, when the administration of justice, both civil and criminal, will turn very much upon the character of the litigating parties, their testimony being mainly looked to for the establishment of the facts upon which the law will pronounce its judgments'. We think the issue in this case involved, directly the character of the assured. He was charged with having perpetrated a gross fraud upon the insurance company. Evidence of his good character was admissible to rebut any inference unfavorable to him which might have been deduced from the evidence offered against him."

German American Assoc. vs. Farley, 102 Ga, 720.

Georgia Southern Railway Co. vs. Ransom, 5 Ga. App., 740, was an action for damages against the Railway Company for the tortious conduct of defendant's conductor. It was held that the testimony as to the general character and reputation of the offending conductor for polite and courteous treatment of his passengers was admissible. The Court held, however, that the erroneous exclusion of such testimony was not of sufficient gravity as to justify a reversal, but the case was reversed upon another proposition. A witness for the defendant, who testifies to the good character of the defendant for peaceableness, and that he had never heard of defendant having a difficulty before, may be asked by the State, on cross-examination, if he had never heard of defendant shooting anyone before, of if he had never heard of him shooting a man in another State.

Ozburn vs. State, 87 Ga., 173.

Indictment for murder. Judge Lamar says:

"Character for violence, both of the deceased and the accused, had been put in issue. The Court properly refused to allow the defendant to prove specific acts of violence on the part of the deceased towards his wife. Ordinarily, even the general character of the parties is inadmissible, and their conduct in other transactions is especially irrelevant. Civil Code, Section 5159. In a trial for murder the general

character of the deceased for turbulence and violence may be shown, but specific acts are inadmissible. Pound vs. State, 43 Ga., 128; Doyal vs. State ,70 Ga., 147; Thornton vs. State, 107 Ga., 687. On the same principle, the general character of a witness for truth may be shown for the purpose of impeachment, but specific acts cannot be made the subject of inquiry (Civil Code, Section 5293), and for the reason that every man is supposed to be able at a moment's notice to establish his general character for truthfulness or for peaceableness; but the best, as well as the worst, might often be unable to explain a single transaction requiring the presence, not of anyone familiar with him, but only the eye-witnesses of that special transaction, in order to justify, explain or excuse. The general character of the deceased for turbulence or violence can be shown by his neighbors generally; the State and the accused alike are put on notice that such general character may become an issue in the trial. But no one was bound to anticipate that the specific instance inquired about would be made the subject of investigation. A specific act does not necessarily tend to establish one's general character. The single transaction may have been exceptional, unusual, and not characteristic of the deceased. Where a witness has testified that one bears the character of being peaceable, it may sometimes be proper, on cross-examination to inquire if the witness has not heard that the man, whom he says was peaceable, had in a particular case acted in a manner directly contrary to such reputation. Ozburn vs. State, 87 Ga., 180. But this line of questioning is intended solely to test the truthfulness of the witness, and not for the purpose of making an investigation of other transactions. To allow proof of specific acts of violence would prolong the trial, multiply the issues, and confuse the jury."

Andrews v. State, 118 Ga. 1.

Indictment for rape. Judge Turner says:

"In the trial, the defendant offered J. T. Anderson, as a witness to prove that he had had connection with this young woman on a certain occasion. The Court excluded this evidence, holding that her lewdness could only be

shown by her general bad character, and not by specific acts. The Court did not err in this rnling. In the case of Camp vs. State, 3 Ga. 417 which was a case of assault with intent to rape, this Court held that 'evidence that the person charged to have been injured is a common prostitute, or evidence or reputation that she is a woman of ill fame, may be submitted to the jury, to impeach her credibility and disprove her statement that the attempt was forcible and against her consent. But the Court added: (p. 422) 'It seems that testimony of specific acts of lewdness is not admissible. . . . We adopt the view indicated in the Georgia case above referred to, because it seems to be supported by the great weight of authority, and appears to be founded on good reason. If proof of specific acts of lewdness were admitted, it would "not only involve a multitude of collateral issues, but an inquiry into matters as to which the prosecutrix might be wholly unprepared and so work great injustice." Many of the text books on criminal law are to the same effect. These authorities relate to acts of lewdness committed with persons other than the prisoner. There are many cases holding that the injured woman may be examined as to previous acts of this character with the defendant, on the hypothesis that acts of lewdness committed with him prior to the alleged assault tend to strongly show that she was not in fact forcibly violated on the particular occasion under investigation. The rule relating to the admission of evidence of this nature is thus stated in 3 Gr. on Ev. (16th Ed.), Sec. 214: 'The character of the prosecutrix for chastity may also be impeached; but this must be done by general evidence of her reputation in that respect, and not by evidence of particular instances of unchastity. Nor can she be interrogated as to a criminal connection with any other person, except as to her previous intercourse with the prisoner himself; nor is such evidence of other instances admissible."

Black vs. State, 119 Ga., 746.

In a criminal prosecution, evidence of good character of defendant is always admissible, but it should be con-

fined to the trait of character in issue; so that, in a case of embezzlement, where the trait of character at issue is honesty and fair dealing, evidence that the defendant is a peaceable, quiet and law-abiding citizen, or that he is a man of sober and industrious habits, would not be admissible, because these questions do not bear upon the defendant's character for honesty.

State vs. Moyer, 58 W. Va., 46.

The danger of character testimony is inherently such that the courts have found it necessary to enforce the rule as regards this testimony like that regarding the admission of other testimony, that such testimony must be strictly relevant to the issue or charge involved. For example: On an indictment for seditious publications, the defendant could not show that he was a faithful member of the church. The Court said in such case "that a man might do all this and yet be a naughty man in printing abusive books to the misleading of the king's subjects. Dover's trial, 6 How. St. Tr. 539 (1663); or, as Mr. Erskine says, arguing in Hardy's trial, 24 How. St. Tr. 1076:

"Suppose a man be charged with an unnatural crime, would it be any evidence at all of that man's character that he paid his bills regularly, or that he was honest or anything of that sort? No, your examination of character must always be analogous to the nature of the charge, and in this case you would inquire whether he was a man of chastity. . . . so, if a man is indicted for any other offense, or for robbery, I should say that he was not a necessitous man, that he possessed a large fortune at that time. This is the nature of character."

As stated by Judge McClellan, in Morgan vs. State, 88 Ala., 224:

"The object and effect of such evidence (character evidence) is to disprove guilt by furnishing a presumption that the defendant would not have committed the offense, and hence the character sought to be

proved must be such as would make it unlikely that the party would do the controverted act."

Baron Martin says, in Rex vs. Rotan, L. & C. 520, that it must be "good character with respect to the species of crime charged against him."

In Kilgore vs. State, 74 Ala., 71, it was said that it must be a "trait having reference and analogy to the subject of the prosecution."

So it was held in Morgan vs. State, 88 Ala., 22, in an indictment for assault with attempt to kill, the defendant's character for truth was excluded upon the ground that it had nothing to do with the nature of the crime charged.

In Key vs. State, 28 Ark., 155, it was held that the character must be "such as would make it unlikely for the defendant to be guilty of the particular crime with which he was charged."

In People vs. Joseph, 7 Cal., 129 in an indictment for an attempt to rape, it was held that the character for immorality and good behavior, and other general character, would be excluded, becaused the character ought to bear some analogy and reference to the nature of the charge.

It must be borne in mind that the purpose of character evidence is to show that the defendant has such characteristics as would make it unlikely for him to have committed the crime charged in the indictment, and it must be remembered that the law recognizes one method of proof of such characteristics, that is, by his general reputation. Like all other evidence, this evidence must be relevant to the issue.

What kind of character, therefore, is provable, in a murder case? Certainly not a character for chastity, nor a character for honestly, loyalty, bravery, cowardice, industry, nor any other of the innumerable characteris-

tics of humanity, save the character for peace and violence.

The definition of murder, the violent taking of human life, in the peace of the State, with malice afore thought shows the characteristics involved in a murder. The principle above set out is universally recognized by all the courts in the United States and in England. In homicide cases, it is the pacific character of the defendant, or as frequently stated, his reputation for peace and quiet, to which the inquiry will be confined. Dupree vs. State, 33 Ala. 380; Gibson vs. State, 89 Ala. 127; 8 So. Rep. 98; MacLin vs. State, 44 Ark. 122; Weaver vs. State, 83 Ark. 119, 102 S. W. Rep. 713; People vs. McSweeney, 39 Pac. Rep. 743; Ozburn vs. State, 87 Ga. 173, 13 S. E. Rep. 247; Walker vs. State, 102 Ind. 506, 1 N. E. Rep. 856; Carr vs. State, 135 Ind., 1, 34 N. E. Rep. 533; State vs. Sterrett, 71 Iowa, 386, 32 N. W. 387; State vs. Simmons, 74 Kan. 799, 88 Pac. Rep. 57; Newton vs. Com., 102 S. W. Rept. 264, 31 Ky. L. Rep, 327; Demaree vs. Com. 82 S. W. Rep, 231, 26 Ky. L. Rept. 507; State vs. Grigsby, 117 La. 1046. 42 So. Rep. 497; Johnson vs. State (Miss. 1906), 40 So. Rep. 526; State vs. Wells, 1 N. J. L. 491; State vs. Shafer, 22 Mont. 17, 55 Pac. Rep. 526; Gandolfo vs. State, 11 Ohio St. 114; Cathcart vs. Com. 37 Pa. St. 108; Com. vs. Twitchell, 1 Brews. (Pa.) 551; Mitchell vs. State (Tex. Crim. 1907), 100 S. W. Rep. 930; Holloway vs. State, 45 Tex. Crim. 303, 77 S. W. Rep. 14; State vs. Stentz, 33 Wash. 448, 74 Pac. Rep. 588 State vs. Cushing, 14 Wash. 527, 45 Pac. Rep. 145; State vs. Gremeans, 62 West. Va. 134, 57 S. E. Rep. 405.

It has been held that evidence of the defendant's reputation for peaceableness and quietude is admissible as being the trait of character involved in the offense, although he is charged with murder by administering poison.

Hall vs. State, 132 Ind. 317, 31 N. E. 536;
Carr vs. State. 135 Ind. 1; 34 N. E. 533.

It has been held that the character for honesty, truth and veracity, or integrity of one accused of murder is not in issue and evidence thereof is inadmissible. Morgan vs. State, 88 Ala. 223, 61 So. Rep. 671; Smith vs. State, 142 Ala. 14, 39 So. Rep. 329; People vs. Cowgill, 93 Cal. 596, 29 Pac. Rep. 228; State vs. Besser,115 La. 259, 38 So. Rep. 985; State vs. Griggsby, 117 La. 1046, 42 So. Rep. 497.

Proof of the defendant's character for bravery and cowardness has been held inadmissible in the trial of one accused of homicide. Keys vs. State, 122 Ind. 527, 23 N. E. 1097.

And proof of the defendant's moral character generally has been held inadmissible in the trial of one accused of homicide, Walker vs. State, 102 Ind. 506, 1 N. E. 856; Boes vs. State, 39 So. 921; State vs. Dexter, 115 Iowa 678; 78 Mo. 555;44 Cal. 288; 189 N. Y. 408; 27 Mo. 13; 119 Mass. 342; Masten vs. State, 83 Miss, 647, 36 So. 7; People vs. Stewart, 28 Cal. 395; People vs. Fair, 43 Cal. 137; People vs. Casey, 53 Cal. 360; also 62 Cal. 27, 29; State vs. Blum, 68 Ind. 54.

In a prosecution for murder, it is proper to exclude evidence that defendant is reputed in his home country to be a man of truth and veracity. Johnson vs. State, 129 Wis. 146, 108, N. W., 45, 9 Am. & E. Ann. Cas. 923.

In murder cases, the prisoner's general reputation for peace and good order is admissible. People vs. Stewart, 28 Cal. 398; Key vs. State, 28 Ark. 155; State vs. Kenley, 43 Iowa 294; State vs. King, 78 Mo. 555; State vs. Pearce, 15 Nev. 188; State vs. Ewing, 59 Vt. 84.

The general character for peace and quiet of a prisoner may be proved in his defence upon a trial for a crime of violence. Hirschman vs. People, 101, 111. 568.

From the above cases and authorities, it is clear that

a defendant may prove only those traits of character involved in the crime charged in the indictment, and can do this only by general reputation, not by proof of particular acts or hearsay of particular acts.

What then is the province of the cross-examination of defendant's character witnesses? According to Judge Cooley, in Annis vs. People, 13 Mich. 511, the real purpose of the cross-examination of a witness testifying to the character of another person is to enable the court and jury to determine whether the witness in fact knows the general reputation of the other, and if so whether he testifies truly in regard to it. In testifying to the credibility of such witness, the same means are resorted to as are employed to determine how far a witness, who testifies to any other fact of similar relation to the issue on trial, is to be believed. His sincerity, his disinterestedness, or bias, the extent of his knowledge or information, his acquaintance with the speech of the people of the community in which the person criticised resides, and the opportunities he has had for acquiring accurate information on the subject are matters legitimately open to inquiry.

With these rules in mind, it will be readily seen that the scope of cross-examination of a character witness does not include any questioning with respect to a trait of character not covered by direct examination, that is, with respect to a characteristic not involved in the crime charged in the indictment. Where defendant introduces evidence as to his good character, inquiry must be limited to his general character as to the trait in issue. See numerous cases cited in Volume 14, Century Digest, Section 841.

On cross-examination, if the defendant on trial for murder tenders an issue upon his character for peace and quiet, it will be competent for the prosecuting attorney

to test the credibility of the testifying witnesses by asking them if they know, or had heard of various breaches of the peace by the defendant. State vs. Beckner, 194 Mo. 281, 91 S. W. 829.

A witness who testifies to the good character for peace and quiet of a prisoner on trial for murder, may be asked upon cross-examination if he had not heard of specific acts of violence previously committed by defendant, (Goodman vs. State, 102 Ala. 82, 16 So. 571), or if he had not heard that the defendant had killed a man on one occasion. (Ingram vs. State, 67 Ala. 67), if he had never heard of defendant shooting anyone before, and if he had never heard of his shooting a man in another State. (State vs. Ozburn, 87 Ga. 183, 13 S. E. 247.)

From these cases, it will be noted that the cross-examination of a character witness may cover hearsay of specific instances illustrating the specific trait involved in the crime charged, and such traits only.

An interesting case is that of State vs. Becker, 194 Mo. 281, 91 S. W. 892. Under the law of Missouri, a defendant may offer himself as a witness in his own behalf, and in doing so subjects himself to impeachment as any other witness. The defendant did not put his character for peace or violence in issue, but the prosecution was allowed to prove in the trial court that the defendant had a general reputation for violence. This was held to be error. Judge Gantt of the Superior Court delivering the opinion, says in part:

"In our opinion, our esteemed brother of the criminal court erred in holding that a reputation for being violent and turbulent was tantamount to evidence of a reputation for general bad character and admissible to impeach the credibility of the defendant as a witness. Had the defendant offered evidence of his character for peace, quiet-

ude, and good order, there can be no doubt whatever that it would have been competent then for the State to have rebutted such evidence, by proving that he was a quarrelsome, turbulent, and dangerous man, as tending to prove he was the aggressor, but it was not competent for the State to make this proof until the defendant had first put his character as a peaceable or violent man in issue. It seems clear to us that this evidence went directly to the character of the defendant as a defendant in the case, and not to his credibility as a witness; and, this being so, we must hold it was reversible error. And, if we are right, it was not cured by the fact that the defendant sought to mitigate the effect of this evidence by offering evidence in his own behalf tending to prove that his reputation for peace and quiet prior to the homicide was good. Indeed, the error in the first instance was accentuated by the fact that, when the defendant did offer evidence tending to show his good reputation for peace and good order, the prosecuting attorney was permitted to examine defendant's character witnesses as to alleged specific acts of bad conduct by defendant towards other persons. We do not desire to be misunderstood on this point. If the defendant had, in the first instance, tendered his character for peace and quiet, it would have been competent for the prosecuting attorney to have tested the credibility of the defendant's character witnesses, by inquiring of them if they did know, or had not heard, of the various breaches of the peace and criminal conduct on the part of the defendant, as he did; but, until he had made his character in this respect an issue in the case, it was clearly improper to have admitted evidence of his bad character, which did not tend to effect his credibility."

"The general rule is that if the accused has adduced evidence of good character, the prosecution may show bad character in respect to the trait involved. The rule does not allow evidence of general character but only of character in respect to the trait involved in the charge." Abbott's Trial Brief, Criminal Causes, Section 92.

The State, in the trial of a woman for murder, cannot be permitted to assail her private character for chastity by proving specific acts and making innuendoes. State vs. Kennedy, 177, No. 98.

It was prejudicial error to permit the Commonwealth, upon a trial for murder to prove by a witness that the general reputation of the defendant and his son, a witness for the defence, for honesty was not good, and that all the family, with some exceptions, were reputed to steal hogs. Young vs. Commonwealth, 6 Bush. (Ky.) 615.

In the prosecution for a crime, testimony of independent witnesses to things merely derogatory to the character of the accused is inadmissible. Baker vs. State, 120 Wis. 135, 97 N. W. 566.

Like the defendant, the prosecution must confine its proof of character to evidence of general reputation. In no event is the State authorized, in the trial of a woman for homicide, to introduce evidence of her particular acts showing a want of chastity. Thompson vs. State, 38 Tex. Rep. 335, 42 S. W. 974.

Where a person accused of a crime introduces evidence as to his good character and reputation, it is not competent for the presecution, on cross-examination of the defendant's witnesses, to show any specific acts tending to prove defendant's character to be bad.

Patterson vs. State, 41 Neb. 538, 59 N. W. 917.

In Basye vs. State, 45 Neb. 348, 63 N. W. 811, a trial for murder, evidence tending to show the defendant's general reputation as a peaceable and quiet man in the community in which he resided prior to the offense charged, is competent, but his reputation for honesty and integrity is inadmissible.

The Court says at 63 N. W., page 818:

"Upon the trial, the defendant offered to prove by two witnesses, D. O. White and Jas. Casement, while they were upon the stand, that his reputation for honesty and integrity was good in the community where he lived. The Court excluded the offered testimony, of which action complaint is now made. The text books and the adjudicated cases agree that, in a criminal trial, evidence of the previous good character of the defendant is always admissible, as a fact for the jury to consider in determining the question of guilt or innocence. The character the defendant is entitled to prove must be consistent with the offense charged. For instance, in a prosecution for murder, the general reputation as a peaceable and quiet man is competent, but not his character for honesty and integrity. Had this prosecution been for larceny, then the offered evidence would have been admissible." Whart. Cr. Ev. Sect. 60, note 3.

The character of the defendant cannot be assailed by the State by proof of his specific acts of wrongdoing.

State vs. McDonough, 232 Mo. 219, 134 S. W. 545.

In the prosecution for homicide, defendant claimed that in altercation with deceased over his illicit relations with defendant's wife, defendant had shot deceased in self-defense. The State introduced evidence that defendant had illicit rleations with deceased's daughter which were wholly unknown to deceased. Held, that the evidence of the State was not admissible to show the bad character of the defendant. The Court says:

"But a defendant on trial for a crime of any grade is entitled to offer in his defense as to his good character. Such evidence is permitted as to and should be limited to such character as would show that it would b eunlikely that the defendant would commit the crime with which he is charged. 1 Wigmore on Evidence, Sect. 56; Greenleaf on Evidence, Sect. 146; Kee vs. State, 28 Ark. 155; Edmonds vs. State, 34 Ark. 720; Maclin vs. State, 44

Ark. 115. After the defendant had offered testimony of his good character in his own aid, the prosecution may by way of rebuttal offer evidence of his bad character. The object of permitting the prosecution to introduce such evidence is not for the purpose of showing the bad character of the defendant; but it is for the purpose of refuting the claim that he had a good character, and thus to prevent the defendant from imposing a false character upon the jury. But, as is said in the case of State vs. Laxton, 76 N. C. 216; 'This right of reply, however, is only coextensive with the privilege of the defendant and is limited to evidence of general reputation.' The prosecution is not permitted even on rebuttal to show specific acts of misconduct. The testimony that is here permissible is similar to that testimony of general reputation which is allowed in order to impeach a witness."

Ware vs. State, 91 Ark. 555, 121 S. W. 927.

Indictment for assault with intent to kill. Evidence that the defendant has good character for truth and veracity is incompetent because it does not go to show any characteristic or quality which tended to illustrate or shed light on the offense charged. If the defendant had a reputation of being a quiet, peaceable man, or the like, this would have a tendency to lead the jury to believe that he would not have committed the violent act with which he was charged; but the fact that he bore a good character for truth and veracity could exert no legitimate influence in determining whether he had been guilty of a malicious, violent and deadly assault. How important such evidence would be had he been charged with crime falsi! The object and effect of such evidence is to disprove guilt by furnishing a presumption that the defendant would not have committed the offense; hence the character sought to be proved should be such that it would be unlikely that the party would commit the con-

troverted act, as for example, in murder **the prisoner's reputation for peace and good order is admissible.** The State in rebuttal is not allowed to prove particular acts or certain conduct of the defendant's tending to show low and immoral association. This is illegal evidence.

Morgan vs. State, 88 Ala., 223, 6 So. 761.

No more deadly weapon could have been used against Frank than the general charge of lasciviousness. The minute the Court permitted it, the situation of the defendant became desperate. The jury never could and never did divest their minds of the suspicion this evidence engendered. At the Pencil Factory the defendant was in power. What vile use did he make of his opportunities! These little girls were brought into daily association with him. What dastardly wrongs had they suffered at his hands! So bold and outrageous had been his life and conduct that he had gained a general reputation for lasciviousness. How many dark deeds had he perpetrated at that factory before his character had been discovered! And how many more had been made possible by the very knowledge of his character!

It is true of men as well as of dogs. Give them a bad name and you had just as well hang them. Indeed, a bad name and nothing more often does hang.

IMPROPER QUESTIONS BY THE SOLICITOR.

(Grounds 31, 33, 40 46, and 90, page 64, 70, 79, 106)

It is insisted that the Court allowed the Solicitor a latitude so wide as to violate the law, both in the manner and substance of his cross-examinations.

In Ground 31 it will appear that the Solicitor was seeking to show by one Schiff, one of the most material, if not the most material, witnesses for the defense, the

location of a certain dressing-room. Schiff did not locate the room as the Solicitor wished, but there was no evidence of any hesitancy or evasion; but, solely because the witness did not argue with the Solicitor, he sneeringly asked: "You have no objection to telling it, have you?"

Objection was made that Schiff had shown no objection to answering the questions; that such questions were a reflection on the witness; and that the Court ought not to permit it.

The Court over-ruled the objection and permitted the Solicitor to repeat his insinuation, by saying: "Have you any objection to answering the question, Mr. Witness?"

The clear purpose of the Solicitor was to taunt, badger and reflect upon this material witness and, thereby, discredit him before the jury. For such treatment, he had given no cause.

The Court's failure to forbid the Solicitor asking these questions, openly sanctioned his conduct, and, hence, by implication, told the jury that Schiff was hesitating and evading the information sought.

In any case such a reflection upon a material witness would be hurtful; but, in this case, it was peculiarly so. The Court was proceeding under great public prejudice and excitement. The prisoner, his counsel, and his witnesses were under hostile scrutiny. Under the circumstances, they were entitled to the fullest protection, not only by the Solicitor but by the Court. The Solicitor's failure to do so was bad enough; but, when the Court sanctioned the Solicitor's default, the result was a calamity.

Phillip Chambers, (Ground 33), a youth, 15 years old, had been an office boy at the factory, and was a witness for the defense.

The Solicitor was permitted on cross-examination to insinuate over and over again, by suggestive questions, that this youth had been a companion of the defendant in un-natural conduct. To each of such questions, the boy made emphatic denial. Whereupon, the Solicitor, by inferential questioning, sought to show that he had, to one Gantt, made admission of such conduct.

After repeated and strenuous objections, and a motion to rule out the questions and answers, the Court said: "I sustain your objection." Upon such statement being made, the following colloquy took place between the Court and Solicitor in the presence of the jury:

The Court: "Have you any other questions, Mr. Dorsey?"

Mr. Dorsey: "That is all I wanted to ask him. I will bring Gantt in to impeach him."

The Court: Well, I have ruled all that out."

Mr. Dorsey: "Well, we will let Your Honor rule on Gantt, too."

On the cross-examination of Miss Mary Pirk (Ground 40), the Solicitor, over the objection of defendant, was by questions permitted to insinuate and suggest to the jury that Frank had been guilty of immoral conduct; that he had gone into the dressing-room of girls; that, as he would go by, he would slap the girls; and that Frank had sought to be familiar with Mary Phagan.

The substance and form of these questions were such as to lead the jury to believe that the Solicitor had evidence as to the facts inquired about; and the declination of the Court to exclude the questions and answers from the jury naturally and inevitably impressed the jury that such evidence was material to the pending trial.

Upon cross-examination of the witness Irene Jackson (Grounds 43 and 78), the Solicitor was permitted, over

objection of defendant, to persistently question the witness in such a way as to impress the jury that the defendant had frequently been guilty of immodest and immoral conduct. To some of these questions, she gave instances of claimed immodest conduct, but to most of the questions she gave negative answers.

A casual reading of these questions and answers demonstrates that the Solicitor did not hope to get affirmative answers, but purposed to insinuate to the jury that he did have evidence of immodest and immoral conduct intimated in his questions.

On the cross-examination of Mrs. J. J. Wardlaw (Ground 46), the Solicitor was permitted to question her as follows:

Q. You never knew of his improper relations with any of the girls at the factory?

A. No, sir.

Q. Now, did you ever, do you know or did you ever hear of a girl who went with Mr. Frank on a street car to Hapeville the Saturday before Mary Phagan was murdered?

A. No, sir.

Q. On the same street car with Hermes Stanton and H. M. Baker and G. S. Adams?

A. No, sir.

Q. And about his putting his arm around her and trying to get her at various places to get off with him?

A. No, sir.

Q. And go to the woods with him?

A. No, sir.

Q. She was a little girl that got on at the corner of Forsyth and Hunter streets, there where the car passes?

A. No, I don't know that.

Q. You never heard of it at all?

A. No, sir.

Q. The Saturday before?

A. No, sir.

Q. You say you have never heard of any act of immorality on the part of Mr. Frank prior to April 26, 1913?

A. No, sir, I did not.

Q. You never talked with Hermes Stanton or H. M. Baker, the conductor or motorman?

Q. I will put it that way then, you never heard that, the Saturday before little Mary Phagan met her death, Mr. Frank went out on the Hapeville car on which Herman Stanton and H. M. Baker were in charge, and that he had his arm around the little girl, and that he endeavored at various places to get that little girl to get off the car and go to the wood with him?

A. No, sir.

Q. You never heard such a statement as that at all by anybody?

A. No, sir, I did not.

These questions, no matter what the answers were, ought to have been withdrawn by the Court. It is not to be supposed, and the jury certainly did not suppose, that the Solicitor was asking these questions merely to fill in space or as a mere shot in the dark. The jury must have understood that the Solicitor had knowledge of the conduct asked about and that the Court, in permitting the questions, thought such conduct material.

On the cross-examination of the witness Ashley Jones (Ground 90), the Solicitor was permitted to propound a series of questions clearly intimating that Frank had sought to force his attentions upon the girls at the factory and had been guilty of various acts of immodesty and immorality.

That the Solicitor did not expect that any of this claimed conduct could be proven by this witness, and that he was really intending to impress the jury by insinuations implied in his questions, is made certain by an incident occurring during a cross-examination of the witness.

During the cross-examination, Mr. Arnold objected to the questions being asked, and the following colloquy occurred:

The Court: "On cross-examination, he can ask him if he has heard of certain things?"

Mr. Alnold: "Up to April 26th?' '

The Court: "Yes, sir."

Mr. Dorsey: "I'm not four-flushing or any such thing; I am going to bring the witnesses here."

The Solicitor exposed his full purpose. He expected nothing from the witness. But he was not four-flushing; he hid have witnesses to prove all the things he was intimating by his questions.

These questions ought to have been withdrawn from the jury. It is not enough to say that questions alone are not harmful. Theoretically, it may be that a question not answered, or answered in the negative, when an affirmative answer is sought, could do no harm . But such is not the result in practice. A suggestion by mere insinuation in the shape of a query is often as dangerous and emphatic as affirmation answer. To the ordinary mind, a question may be so framed and put as to be as effective as a direct question, and an affirmative answer. What experienced lawyer has not felt the telling effect of a question, even when the question, itself, has been withdrawn?

How much more potent is a question which insinuates the answer when, upon request, the Court declines to withdraw it. No matter what the answer really is, although it may deny the insinuation of the query, the fact that the question has the sanction of the Court manifolds its power for harm.

True, harmful questions are usually followed by harmful answers, but harm does not entirely depend upon

the answer. That both, together, are very harmful does not at all signify that either, alone, might also be painfully hurtful.

Even if the Solicitor had in every instance received the answer he wished, the questions and answers taken together would not have been admissible.

Suppose the boy, Chambers, had admitted to acts of perversion; that Mary Pirk had affirmed that Frank had been guilty of immoral and immodest conduct with girls; that Irene Jackson had admitted all the immoral acts that the Solicitor sought; that Mrs. Wardlaw had testified that Frank, before the death of Mary Phagan, went out on the Hapevile car with his arm around a little girl, whom he endeavored to take in the woods with him. How would all this illustrate the question: Whether the defendant, on April 26th, 1913, murdered Mary Phagan?

None of the conduct or transactions inquired about were in any way connected with the Phagan murder. They were separate, independent transactions. If every one of them were true, still Frank might nevertheless be innocent; or they might everyone be untrue, and Frank nevertheless be guilty. Between them and Frank's guilt or innocence, there was not a connecting link.

While such conduct and transactions would throw no legal light upon Frank's guilt or innocence, it by no means follows that such charges against him would be harmless.

That the public, from which the jury was drawn, was greatly prejudiced against Frank is found on many pages of this record. In such a trial as Frank had, anything that tended to disgrace him, or to excite prejudice or passion, was a powerful factor gainst him.

He was the employer of a large number of little girls.

Let the jury get the least intimation that he used his position to force himself upon them, or that he occupied immodest and immoral relations with them, and his speedy conviction was almost a certainty.

The Solicitor knew this, and the record is full of his efforts to take full advantage of this very dangerous and natural feeling in the jury box. These questions are a part of the plan to impress upon the jury that Frank was a pervert and a dangerous element in the lives of these little factory girls.

That the Solicitor thought he had the right to do this must be true. Doubtless he thought it to be his duty to blacken Frank as much as he could, whether by questions which would bring the desired answers or by questions that he knew would receive negative answers. It will not do to think that he asked questions without a purpose. The purpose was evident by the questions, themselves; the answers he did not care about, the questions were sufficient.

Nor would the conduct sought to be elicited be material, although Frank had placed his character in issue. His character as to his relationship with women was not involved in the case. His character for peace and violence was involved, but not his character for lasciviousness and chastity. (See authorities, supra).

Nor would the fact that these questions were had on cross-examination make any difference. True, particular acts relevant to the issue may be brought out on cross-examination, but only such particular facts and transaction are relevant as illustrates the particular trait of character involved. If the trait involved is peacefulness, then on cross-examination particular acts and transactions of violence may be heard, but not particular acts

of lasciviousness, honesty, generosity, loyalty and the like.

In the case of Cargill vs. Commonwealth, (Ky.) 13 S. W. Rep. 916, the principle here contended for was stated by the Court in the third head note as follows:

"A conviction will be set aside where counsel for the State persisted in asking improper and prejudicial questions, and was allowed to cross-examine the accused as to other offenses, though he was told that he need not answer, and the closing speech to the jury was of an extraordinary and reprehensible character, and it is evident that there has not been a fair and impartial trial."

In this case, Cargill was indicted for the unlawful detention of Lillian Yarbrough, a female, against her will, and with the intention of having carnal knowledge with her. The State's attorney persisted in asking questions as to the detention of other women by Cargill, and as to his intercourse with other women.

In discussing this subject, Justice Pryor, for the Court, said:

". . . the conduct of the attorney for the state in his closing speech to the jury was of the most extraordinary and reprehensible character. His blasphemous language to the jury in the presence of the judge, whose duty it was to see that the accused had a fair trial, blackens this record, into which it is copied, conducing evidently, to unnerve the judge and the jury, the entire trial being a mere travesty on the administration of justice. The accused had been taken into custody, and was held for trial by the strong arm of the law; and, although he may be a man of bad character, when entering the temple of justice to answer for the commission of the alleged offense he was entitled to the protection of the law, and this means a fair and an impartial trial. This he has not had."

In the case of People vs. Mullings, 83 Cal. 138, 23 Pac. Rep. 229, the Supreme Court of California says:

"Where the State asks defendant a long list of questions as to communications made by him to his wife, an objection to several of them that the communications were privileged and the questions incompetent is sufficient, without repeating the objection to every question."

"Where the state asks defendant a long list of incompetent questions which assume defendant's guilt, with the evident intention of impressing the probability of his guilt on the minds of the jurors, it cannot be said that the questions were not prejudicial to defendant, though he answers them in the negative."

In the discussion, 23 Pac. on page 231, McFarland, for the Court, says:

"Counsel for respondent contends that the questions asking defendant about conversations with his wife did not injure him, because his answers to them were mostly in the negative. But what answers were expected? After defendant testified that he did not kill John Moore, can any sane man think that the district attorney supposed for a moment that defendant would answer affirmatively a long list of questions framed upon the presumption that he did kill him? Why, then, did he ask them? And if the questions and answers did not help to strengthen the case against defendant, why did not the prosecution consent to have them stricken out? It is quite evident that the questions and not the answers were what the prosecution thought important. The purpose of the questions clearly was to keep persistently before the jury the assumption of damaging facts which could not be proven, and thus impress upon their minds the probability of the existence of the assumed facts upon which the questions were based. To say that such a course would not be prejudicial to defendant is to ignore human experience and the dictates of common sense. The questions themselves were incompetent, and, after one or two of them had been asked showing the purpose of the prosecution, counsel should not have been allowed to ask others of like character. A similar point to the one under discussion,—that is, that the defendant was not injured by

the questions on account of the character of the answers —was made in Gale v. People, 26 Mich. 161; but in that case, Judge Cooley, delivering the opinion of the court, said: 'A review of the evidence in this case suggests very forcibly that, however full may be the explanation, a list of questions which assume the existence of damaging facts may be put in such a manner, and with such persistency and show of proof, as to impress a jury that there must be something wrong, even though the prisoner fully denies it, and there is no other evidence. Holding that these questions were erroneous, and that they might, and probably did, prejudice the prisoner, the conviction must be set aside, and a new trial ordered.' ''

"The state's attorney, while cross-examining defendant as to his previous residence and manner of life, asked him whether he had not committed a crime, and been confined in the penitentiary; and held in his hand, in view of the jury, what appeared to be a letter, which he referred to while asking the questions. Defendant's attorney called this an artful effort to make the jury believe that the questions were based on facts, whereupon the State's attorney said that he had not referred to the paper for mere 'buncombe,' but that he had reliable information on which he asked the questions. Defendant's defense as to the murder charged depended almost entirely on his own testimony. Held, that the conduct of the State's attorney was prejudicial error, though it was reprimanded by the Court, and the jury were instructed that only the evidence in the case and the law as given them were to be considered in arriving at a verdict.''

Holder vs. State, 58 Ark. 473, 25 S. W. Rep. 279.

In discussing this case, on page 282, Justice Battle says:

"The appellant was accused of having caused his wife to take the poison which caused her death, and the evidence adduced at the trial tended to prove the accusation. His testimony offered the only explanation consistent with his innocence as to how she was poisoned, and his acquittal depended in a large measure, if not solely,

on his credibility. The remarks of the prosecuting attorney, if believed, tended to discredit him. How far they did so depended on the credence the jury gave to them. Coming from a person occupying the position of prosecuting attorney, and apparently founded on the letter to which he referred when he cross-examined the defendant, they were well calculated to prejudice the appellant in his trial before the jury. The persistence of the State's attorney in defending his action by the assertion that he had reliable information from other sources other than the letter as to the subject matter of his cross interrogatories increased the prejudice by causing the jury to give less weight to appellant's testimony. They might have thought he was warranted in doing so on account of reliable information he had received, from the fact he earnestly insisted, in defiance of the court, that he had been reliably informed that that which his interrogatories implied was true.

"As a general rule, 'an objection by the opposing counsel, promptly interposed, followed by a rebuke from the bench, and an admonition from the presiding judge to the jury to disregard prejudicial statements,'' is sufficient to cure the prejudice. But when we consider the earnest, persistent, and vigorous manner in which the prosecuting attorney attacked the credibility of the defendant by assertions and means unsupported by the evidence, and the mild reproof of the Court, we are not prepared to say that the prejudice was cured in this case. In view of the fact the Court in an instruction told the jury that they were the ''illimitable judges' of the credibility of the witness, it is probable it was not. Upon a view of the whole case, we think that the appellant is entitled to a new trial.''

"Ordinarily the mere asking of an improper question which the Court refuses to allow is not ground for reversal; but where the mere putting of a question conveys to the jury improper information which tends to render the trial unfair the question alone is ground for reversal.''

In the case of the Louisville & N. R. Co. vs. Payne,

133 Ky. 539, 118 S. W. Rep., 352, the Supreme Court of Kentucky has ruled:

"Where counsel for the successful party persistently pursued a line of interrogation of witness which the Court ruled to be wrong, and which one reasonably acquainted with the rules of evidence knew to be improper, and the course pursued was for the purpose of prejudicing the jury, the conduct of the counsel was reversible error."

In the discussion on page 354, Justice Lassing, for the Court, says:

"Of course a large discretion is allowed an attorney in presenting his case, and so long as it does not appear that he is knowingly and intentionally violating the rules of practice in the introduction of evidence, or otherwise, the fact that he does so will furnish no grounds of complaint to opposing counsel, where the error is corrected by the Court; but in a case like that here presented, where counsel persistently pursues a line of interrogation which the Court rules to be wrong, and which one reasonably well acquainted with the rules governing the admission of evidence must know to be improper, the conclusion is irresistible that it is done for the purpose of influencing and prejudicing the minds of the jury in arriving at a verdict. No court should countenance such conduct; and, when the trial judge, because of his kindness of heart, or long-suffering and forbearing nature, permits it to go unpunished, there remains nothing to do but deprive the one offending of the fruits of his victory thus earned. This case must be reversed for other reasons; but, if there were none such, this misconduct upon the part of plaintiff's counsel would furnish abundant grounds for reversal.

"The rules of practice now recognized and approved by our Court, and Courts generally, are the result of ages of experience in the administration of justice. They are necessarily general in their nature and application, and subject to many exceptions, variations, and modifications, and so it is not to be expected that, in their prac-

tical application to individual cases, mistakes and errors will not be, at least occasionally, made by counsel. Such, in fact, may be expected; but, where corrected by the trial court, no ground of complaint exists because of such mistake. Since no one is infallible, and all are liable at times to be mistaken, and honestly so, in the exercise of the judgment as to what is competent to be proven in support of a given proposition, errors of this character will necessarily occur with more or less frequency, but such are errors of judgment; they are not of the class with which we are dealing. Where the record shows that an attorney persistently and dogmatically pursues a line of interrogation over the objection of opposing counsel and the adverse ruling of the Court to the extent here shown, the conclusion is irresistible that such was not due to error of judgment, but in pursuance of a determination to present the matters about which the questions are asked to the jury in spite of Court and counsel. Such conduct should neither be tolerated nor excused by the trial Court, and no litigant should be permitted to profit by such practice.

"In the case of L. & N. R. R. Co. v. Reaume (Ky.), 107 S. W. 290, it was expressly held to be a reversible error to repeatedly and persistently ask incompetent questions. And in the case of Marcum v. Hargis (Ky.) 104 S. W. 693, this court held that, where a line of questions had been ruled to be incompetent, the trial Court did not err in requiring counsel, before he would permit the question to be asked, to first submit it to him, not in the hearing of the jury, in order that he might determine its competency before he would permit it to be asked. The reason for the rule is apparent. Where an incompetent question is asked, opposing counsel must either permit it to be answered or enter his objection; and, although the trial Court refuses to permit the question to be answered, the very fact that the same question in a different form is repeatedly asked, and a vigorous objection interposed to its answer, emphasizes its importance in the minds of the jury, and necessarily prejudices the case,

and for this reason, if for no other, where this practice is pursued to the extent indicated in the record in this case, the judgment should be reversed."

In the case of Yarbrough v. Weaver, 6 Tex. Civil App. 215, 25 S. W. 468, Justice Finley says:

"The ninth assignment of error complains of the action of the Court in permitting the following interrogatory to be read in the hearing of the jury a number of times, the same being propounded to a number of different witnesses, and each witness answering the same in the negative: 'Didn't Yarbrough tell you that Weaver was a damned old rascal, and that he had it in for Weaver? Didn't he tell you that he intended to put James L Weaver in the penitentiary for stealing?' The Court's attention was called to the fact that each one of a number of witnesses answered these questions, positively, 'No'; and yet, the Court permitted the interrogatories to be re-read in the hearing of the jury as many times as there were witnesses to whom it was propounded. The Court should have sustained the counsel in the objection to the reading of the interrogatories. No possible light could have been thrown upon the issues involved in the case by reading such questions where negative answers were given, and the only tendency of it was to possibly prejudice the minds of the jury against the plaintiff."

In the case of Manigold v. Black River Traction Company, 80 N. Y. Sup., 861, the Supreme Court of New York held:

"In an action for injuries to a passenger, after an objection had been sustained to a question asked of defendant's witness on cross-examination as to whom a doctor, who accompanied the witness on a visit to plaintiff, represented, plaintiff's counsel asked witness whether such doctor did not go to settle with plaintiff, and whether he was not representing an insurance company back of defendant, to which defendant's counsel at once objected, and which was not allowed to be answered. Held, that the asking of such question constituted reversible

error, where it did not affirmatively appear that it did not affect the verdict, though the Court instructed the jury that they should not regard it."

In the discussion of the case, McLellan, Justice, says, page 862:

"The law is well settled that it is improper to show, in an action of negligence, that the defendant is insured against loss in case of a recovery against it on account of its negligence. This was expressly held in the case of Wildrick v. Moore, 66 Hun. 630, 22 N. Y. Supp. 1119. It is not proper to inform the jury of such fact in any manner. It is not material to any issue involved in the trial of the action, and certainly plaintiff's counsel ought not to be permitted to do indirectly what he would not be permitted to do directly. The fact that the defendant in this action was insured was brought to the knowledge of the jury as conclusively by what occurred as if the question had been answered in the affirmative, and it is evident that the question was asked and the inquiry pressed, even after the ruling of the Court that it was incompetent, for the very purpose of getting such fact before the jury. Immediately before the direct question was asked, the Court had ruled that the inquiry as to who Dr. Rockwell represented was incompetent, and the objection to that question was sustained, and yet plaintiff's counsel then asked the direct question, which was, in effect, a statement that there was an insurance company back of the defendant. In order to protect the defendant, its counsel was forced to object to the question, and yet by doing so he, in effect, admitted the fact; otherwise no objection would have been made. It is true the learned trial Court properly struck out the answer, and instructed the jury not to consider it; but plaintiff's counsel improperly got the fact before the jury—a fact which he knew he was not entitled to, and which the Court had just excluded by its ruling. We think this constituted error which requires a reversal of the judgment."

In the case of Cosselmon v. Dunfee, 172 N .Y. 507, the Court of Appeals said:

"Counsel for plaintiff asked a witness for defendants this question: "Do you know whether they carry insurance for accident to their employes?' This question was objected to as incompetent, and objection sustained. While the learned trial judge made a proper disposition of the matter, nevertheless the propounding of the question was calculated to convey an improper impression to the jury. The inquiry into the matter of insurance is not material, and the practice of asking a question that counsel must be assumed to know cannot be answered is highly reprehensible and, where the trial Court or Appellate Division is satisfied that the verdict of the jury has been influenced thereby, it should, for that reason, set aside the verdict."

In the case of Dow v. Town of Weare, 44 Atl. 489, the Supreme Court of New Hampshire held:

"Where the mere putting of a question to a witness conveys to the jury information which cannot properly be laid before them, and which tends to render the trial unfair, a verdict so obtained stands in the same position as if the illegal evidence had been introduced by error in a ruling of the Court."

"The district attorney should not be permitted to ask a series of improper, incompetent, and prejudicial questions, which he knows or has reason to suppose from their character the court will not permit to be answered."

The assumption of the existence of damaging facts may be put in a list of questions with such persistency and show of proof as to impress the jury that there must be something wrong, although the person interrogated answers "No" to every question. Gale vs. People, 26 Mich. 157.

FAILURE TO CHARGE.

(Grounds 60 and 61, page 87, Motion for New Trial).

Timely requests were made to the Court to charge the jury (Ground 60):

"The jury are instructed that if, under the evidence,

they believe the theory that another person committed this crime is just as reasonable and just as likely to have occurred as the theory that this defendant committed the crime, that then the evidence would not in a legal sense have excluded every other reasonable hypothesis than that of the prisoner's guilt, and you should acquit him."

The Court was further timely requested, by written request to charge the jury (Ground 61):

"If the jury believe from the evidence that the theory or hypothesis that James Conley may have committed this crime is just as reasonable as the theory that the defendant may have committed this crime, then, under the law, it would be your duty to acquit the defendant."

The Court did charge the abstract principle set out in Section 1010 of the Criminal Code that: on circumstantial evidence the proved facts must not only be consistent with the hypothesis of guilt but must exclude every other reasonable hypothesis save that of the guilt of the accused.

The defendant, however, was entitled to more than this. He was entitled, upon timely request, to a concrete application of this abstract principle. He was entitled to have the abstract principle concretely adjusted to the particular facts of the case.

Most likely, the general statement that the facts must be consistent "not only with the hypothesis of guilt, but must exclude every other reasonable hypothesis, was but vaguely understood by the jury. Granting, however, that there was complete comprehension of the abstract principle, the defendant was entitled to have it emphasized by an exact application of the principle to the facts.

The general principle charged by the Court was equally applicable to every conceivable case of circumstantial evidence. Upon the defendant's request, it was

the duty of the Court to apply this general principle so that the charge given would fit this particular case.

In the case of Roberts vs. State, 114 Ga., 450, this Court says:

"In a close and doubtful case it is error for the judge to refuse to give the jury, upon an appropriate written request submitted in due time, a charge applying to the facts, as shown by the evidence for the party making the request, the law applicable thereto; and this is true although the judge in his charge states the abstract principle of law applicable to those facts."

In the discussion on page 451, Justice Cobb, after stating the charge requested, says:

"This request contains propositions of sound law. See Cumming vs. State, 99 Ga., 662 (2); Johnson vs. State, 105 Ga., 665; Stubbs vs. State, 110 Ga., 917. An examination of the brief of evidence shows that the charge requested was peculiarly appropriate to the defense set up in the evidence introduced in behalf of the accused. The charge of the judge contains the substance of the section of the Code relating to justifiable homicide, and refers in a general way to the rule, that when the circumstances are sufficient to excite the fears of a reasonable man that a felony is about to be committed on him, and he acts under the influence of those fears and not in a spirit of revenge, the killing is justifiable; but nowhere in the charge is there any reference to the application of this general principle to the particular facts of the case. Under such circumstances the judge should have given the charge requested by counsel for the accused, and his refusal to do so is, in the present case, error requiring the granting of a new trial."

In the case of Crawford vs. State, 117 Ga., 252 Justice Lamar states this rule, as follows:

"A specific charge which is legal and adjusted to a distinct matter in issue . . . and which may materially aid the jury, should be given as requested, although in

principle and in more general and abstract terms it may be covered by other instructions given by the court." Metropolitan R. Co. v. Johnson, 90 Ga., 501 (5); Thompson v. Thompson, 70 Ga., 692 (2); East Tenn. R. Co. v. Smith, 91 Ga., 176; Belt v. State, 103 Ga., 12 (4); Snowden v. Waterman, 105 Ga., 385 (5); Roberts vs. State, 114 Ga., 450."

In the case of Central of Georgia Railway Co. vs. Goodman, 119 Ga., 234, this Court says:

"A refusal to instruct the jury in accordance with a correct request, duly made in writing and peculiarly appropriate to the facts of the case, is, when the refusal probably resulted in harm to the party making such request, cause requiring the grant of a new trial, though the Court gave in charge an abstract principle of law governing the request."

In discussing the case, on page 237, Chief Justice Fish, said:

"The request, therefore, under the circumstances of the case, was peculiarly appropriate and should have been given, unless it was sufficiently covered by the general charge. It was not so covered, unless it was so done in the extracts we have quoted therefrom. The last of such extracts stated the abstract legal proposition that covered the request, and would have been so understood by those knowing the legal signification of the phrase "proximate cause"; but while jurors are presumed to be men of intelligence, we cannot assume, especially in view of some of the allegations of negligence contained in the petition and the evidence relative thereto submitted by both sides, that the jury had clearly in mind the proper meaning of the phrase "proximate cause." It follows, we think that the request should have been given, and as the refusal to give it may have resulted in serious harm to the defendant, it was cause requiring the grant of a new trial. East Tenn., Va. & Ga. Ry. Co. v. Smith, 91 Ga., 176; Roberts v. State, 114 Ga., 450, and cases cited."

In the case of Harrel vs. State, 121 Ga., 607, this Court says:

"A defendant is entitled to a concrete application of the law to the particular facts of a case, if he presents a timely written request to charge, but he is not entitled to an elaboration of the abstract law upon a single phase of the case to such an extent as will give to it undue prominence."

In the case of Alexander vs. State, 8 Ga. App., 531, Chief Justice Hill, for the Court, says:

"Where the accused was on trial for murder, and the evidence for the State would have authorized a verdict either for murder or for voluntary manslaughter, and the evidence for the accused and his statement to the jury would have authorized an acquittal on the ground of self-defense, it was the duty of the court to give to the jury a pertinent instruction, requested in writing, adjusted to the particular facts relied upon to show that the homicide was justifiable because committed in self-defense. The abstract statement of the general principle of law applicable to the facts is not sufficient to clearly instruct and guide the jury, or to insure to the accused the full benefit of his defense. To accomplish these essentials of a full and fair trial the court should make a concrete application of the law to the particular facts in evidence relied upon as a defense. Stribling v. State, 6 Ga. App., 864 (65 S. E., 1068); Roberts vs. State 114 Ga., 450 (40 S. E., 297)."

In the case of Stribling vs. State, 6 Ga. App., 864, Chief Justice Hill again states the rule, as follows:

"A pertinent legal charge adjusted to the particular facts relied upon as a defense should be given in charge to the jury, upon an appropriate written request submitted in due time; and this is true although the judge in his charge states generally the abstract principle of law applicable to those facts."

In the discussion of the case, on page 865, he says:

"He was entitled to have the law applicable to his defense fully stated to the jury, and a request to charge

which specifically applied the law relating to his defense to the particular facts of the case was duly made to the Court in writing. While the charge as a whole and to this defense contains the abstract principle of law applicable thereto, it does not in any way attempt to apply the doctrine of reasonable fears to the particular facts of the case as claimed by the defendant in his statement, and as specifically covered by the request to charge. In the case of Slade v. Paschal, 67 Ga., 541, the Supreme Court says: "To charge an abstract principle of law is well enough, but when the request goes further and seeks a charge that applies that principle to the facts of the case, if the proof justifies its application, to refuse it is error. An abstract principle given may make but a slight impression on a jury, but when it is applied hypothetically to the facts, it aids the jury to a correct result, and is one of the most potent means in the hands of the Court of having the law applicable to the facts fairly administered." It is true in this particular case, the theory of the defendant relied upon and covered by the request to charge is presented only by the statement of the defendant as to what took place at the time of the killing, but we think the principle of law above announced is also applicable, although the facts relied upon as a defense appear only in the statement of the defendant. The jury have the statutory right to believe the statement of the defendant in preference to the testimony, if they see proper to do so. The point now under consideration has been specifically ruled as herein announced, by the Supreme Court, in the cases of Roberts v. State, 114 Ga., 450 (40 S. E. 297) and Johnson v. State, 72 Ga., 679.

In the case of Taylor vs. State, 105 Ga., 847, Chief Justice Simmons said, for the Court:

"When in the trial of an indictment founded upon this section one of the main defenses was that the child was not in fact living at the time the alleged offense was committed, and the evidence bearing on this question was so conflicting as to make it a close and doubtful case, the refusal to give in charge to the jury a written request,

properly framed, and asking the judge to call the attention of the jury to this specific defense by instructing them that the child must have been in fact alive or there could be no conviction, is cause for a new trial. This is so, although the court did in general terms charge upon the law relating to this subject. Thompson vs. Thompson, 77 Ga., 692; Met. R. Co. v. Johnson, 90 Ga., 500; Belt v. State, 103 Ga. 12."

"FAILURE TO CHARGE—CONTINUED."

(Ground 62, Page 82, Motion for New Trial.)

The defendant made timely written request for the following charge to the jury, which was by the Court declined:

"The jury are instructed that, in all cases, the burden of proof is upon the State. The State only half carries that burden when it establishes an hypothesis of guilt but, also, leaves an hypothesis of innocence. If both theories are consistent with the proved facts, the very uncertainty as to which is correct requires that the jury shall give the benefit of the doubt to the defendant. But, when the defendant relies upon circumstantial evidence, he is not obliged to remove the doubt. It is sufficient if he create a reasonble doubt. He is not obliged to prove his innocence; he may rely upon the failure of the State to establish his guilt. If the proved facts in the case establish a hypothesis consistent with the defendant's innocence, and sufficient to create a reasonable doubt of his guilt, this is sufficient to acquit him, and it is not necessary that he should go further in his proof and exclude every possible idea of his guilt. No such burden is upon the defendant."

This request presents an accurate statement of the law as applicable to the case.

Sikes vs. The State, 120 Ga., 494-5.

True, the Court did charge separately and independently that the evidence must show the guilt of the accused beyond a reasonable doubt and (2) that to convict the

defendant upon circumstantial evidence, the facts proven must not only be consistent with the hypothesis of guilt, but inconsistent with the hypothesis of innocence.

But, as to each, the principle was given as tersely as possible—as mere abstractions. No effort was made to apply the circumstantial rule to the facts of the case, neither when the circumstances are presented by the State as evidence of guilt, nor when the defendant, himself, relies upon such circumstances for his defense.

The defendant wanted a fuller, more explicit statement of the rule; he wanted the jury to know in plain English the practical working of the rule, both when offered by the State and when presented by the defendant.

This information was given in the request so plainly as not to be misunderstood.

The case is certainly a close one, and the defendant was due a charge, when he requested, given in plain English, with technical rules so explained, as to leave no doubt as to their meaning.

When a defendant is clearly guilty, dry, technical rules do but little harm; but, in a hard and close case, like this, general, technical rules ought to be replaced by a clean, plain, accurate, concrete adjustment of the rules of law to the particular facts and circumstances of the case. The charge ought to be tailor-made, not a "hand-me-down."

REQUESTED CHARGE AS TO PRESUMPTION.

(Ground 63, Page 88, Motion for New Trial).

By appropriate written request, the defendant sought the following charge:

"No presumption can arise against the defendant because of a failure to cross-examine any witness put up by the State that the defendant was guilty of any particular

act of wrong doing. You should not, therefore, consider that this defendant, because of such failure to cross-examine any State's witnesses, has been guilty of any particular act of wrong doing."

This request applied only to those witnesses of the State, who testified as character witnesses.

Eight girls were examined, who testified that they knew the defendant's general character and that they knew his general character for lasciviousness—that is, his relation with women.

These witnesses were not crossed by the defendant as to particular transactions or as to their opinions as single individuals for the purpose of disclosing the extent and source of their information. For that failure, the Court was requested to charge that no presumption could arise that the defendant was guilty of any particular act of wrong doing and that the jury should not consider him so guilty, by failure of his counsel to cross-examine any of the State's witnesses. Can there be any doubt that the defendant was entitled to this charge?

When was it ever ruled that a failure to cross-examine any witness was such a presumption against the defendant that the jury could legally, as the result thereof, consider the defendant guilty of particular acts of misconduct?

Section 1015 of the Criminal Code does not apply to criminal cases. The presumption therein referred to often arises in civil, but not in criminal, cases.

In criminal cases it is presumed, under all circumstances, that the defendant is innocent until he is proven guilty beyond a reasonable doubt.

A failure, in the first instance, to produce evidence by which the defendant might repel the charge against himself, is no presumption against him.

If so, how can any presumption arise against him, because he fails to cross-examine the State's witnesses?

In the case of Western & Atlantic Railroad Company vs. Morrison, 102 Ga., 319, although delivering a dissenting opinion, Justice Simmons aptly states the rule:

"As the writer had occasion to remark in the recent case of McBride & Company vs. Macon Telegraph Publishing Company (post), "no unfavorable inference can arise against a party so long as he is acting strictly within his legal rights.' For instance, a defendant had a legal right to demur to his opponent's petition; to file inconsistent pleas; to object to illegal evidence when offered; to cross-examine his opponent's witnesses at length, or only as to a single point, or not at all; to make a motion for a non-suit at the close of plaintiff's case; to stand on the case as made out by the latter, or attempt to vindicate himself by the introduction of competent evidence. His election to avail himself of any or all of these legal rights cannot be regarded as furnishing the basis for any inference that he resorts to these means of defense only because he knows that, upon the real merits of the case, he can not but fail. For counsel to argue to the jury that they should reach their conclusion by resort to a test or process not sanctioned by law, is not only "traveling outside of the case," but falls little short of contempt of court. It is not the right of a party, or his counsel, to arraign the law itself and attack its wisdom; certainly not when such party voluntarily goes into court and asks that the law—as it stands, and not as he may think it should be—shall be fairly, impartially and correctly administered."

In discussing Williamson v. State, 9 Ga. App., 442, on page 446, Chief Justice Hill, for the Court, says:

"In Knox vs. State, 112 Ga., 373 (37 S. E. 416), Mr. Justice Little states that this section of the code is entirely applicable to criminal cases. In effect, it tells the jury that if the defendant had evidence by which he might repel or rebut the charge, and fails to introduce it, the

presumption arises that he is guilty. This violates the fundamental principle of criminal law that the guilt of the accused must be shown by competent evidence before a legal conviction can be had. One accused of crime has a right to stand mute, and, unless it affirmatively appears by the evidence that he is guilty, he can not be legally so held. The presumption of the law is that he is innocent, and this presumption remains until he is proved to be guilty. This principle, being inapplicable to criminal cases, has no proper place in the Penal Code."

"Although when no evidence as to the prisoner's character has been introduced, his counsel argues that his character and reputation are good, it is reversible error to allow the State's counsel to argue in reply, over objection, that as the prisoner has not introduced such evidence, it must be because he has no such reputation."

Bennett vs. State, 86 Ga., 401.

"In a prosecution for homicide, where the State omits to offer a witness who was present at the place of the homicide, but who is not shown to have seen the killing, and relies on circumstantial evidence, incriminating admissions, and the dying declarations of the deceased, to establish the defendant's guilt, and where the witness is in court accessible to the defendant, it is not error for the Court to refuse to charge the Penal Code Section 989, relating to the "presumption arising from failure to produce evidence."

Harper vs. State, 129 Ga., 770.

In the case of Mills vs. State, 133 Ga., 155, the Court stated the rule as follows:

"In a criminal case, the Court should not give in charge Penal Code, Sec. 989, to the effect that the omission to produce evidence within a party's reach to repel a charge raises a presumption that the charge is well founded. In all criminal cases the burden is on the State to establish the defendant's guilt beyond a reasonable doubt."

In the discussion on page 158, Justice Evans said:

"In Knox v. State, 112 Ga., 373, a majority of the Court held that it was improper for the State's counsel, in his argument to the jury, to comment upon the absence of a child who was present at the scene of the crime, and who by reason of her tender years was an incompetent witness, although the child was a daughter of the accused, and apparently in his power to produce on his trial. In the specially concurring opinion of Little, J., he said: "While presumptions arise under certain proved facts that a criminal charge against the accused is well founded, such presumption can never arise except upon proved facts; and the principle given to the jury (viz., that stated by the Court in his charge, substantially in the language of the Penal Code, Sec. 989) is, in my opinion, entirely inapplicable to criminal cases. In effect, it tells the jury that if the defendant had evidence by which he might repel or rebut the charge, and failed to produce it, the presumption then arises that he is guilty. This violates the fundamental principle of criminal law that the guilt of the accused must be shown by competent evidence before a conviction can legally be had. One accused of crime has a right to stand mute; and, unless it affirmatively appears by the evidence that he is guilty, he can not be legally so held. The presumption of the law is that he is innocent, and this presumption remains until he is proved to be guilty." We fully concur with the learned Justice in the quoted extract. If the Court should deem it necessary to instruct the jury in a criminal case upon the failure of the defendant to produce evidence, he should certainly go no further than to charge that a conscious omission to produce accessible and competent evidence peculiarly within the power of the defendant to produce may be considered by the jury in weighing the testimony, in reaching the conclusion as to whether the defendant's guilt has been established beyond a reasonable doubt."

It must be borne in mind that even if those girls had been cross-examined, and each of them had testified to

particular acts of mis-conduct, such testimony would have been heard not as proof of the existence of such mis-conduct, but simply as illustrating the extent and foundation of their information as to Frank's character.

Such evidence, itself, would not establish mis-conduct on the part of Frank. Indeed, the evidence as to particular acts of mis-conduct would be relevant only as they illustrate character, and not because it tended to establish mis-conduct. If so, failure to bring out evidence would not authorize a presumption of wrong doing.

RES GESTAE.

(Grounds 32 and 34, pp. 65 and 67, Motion for New Trial.)

Miss Hall, (Ground 32), was a stenographer in the employ of the National Pencil Company. She did not habitually work at the factory, itself, but at the office of Sig Montag, who was an officer of the factory superior to Frank. In cases of emergency, however, Miss Hall did do work for Frank, in the factory office.

For some days preceding the murder, Frank had been without a stenographer, and, as a result, the office work had accumulated upon him.

The defendant sought to prove by Miss Hall that, on the morning of the murder, and admittedly prior thereto, Frank called Miss Hall over the telephone and asked her to come to the pencil factory to do stenographic work, stating at the time that the work he had to do would take him until six o'clock.

The Court declined to admit this testimony upon the theory that it was a self-serving declaration.

It was admitted in the testimony, without dispute, that Miss Hall did leave the office of Sig Montag and go to the office of Frank, at the pencil factory, and there do stenographic work until about twelve o'clock in the day. It was

likewise in evidence that Miss Hall declined to return to the pencil factory for evening work.

The defendant sought to introduce this testimony upon the theory that it explained Miss Hall's presence and work on that morning in Frank's office, and was part of the *res gestae* of that transaction.

Lemmie Quinn (Ground 34) was a pencil factory foreman. He swore that on the day of the murder he went into the factory and into Mr. Frank's room about 12:20 P. M., where he saw Frank at work, and that he went from the factory on to the street and down the street to a restaurant, where he saw Miss Freeman, a lady who, up to the day before the murder, was one of the employees of the factory.

The statement of Quinn as to this visit to the factory was stoutly contested by the State.

Miss Freeman was also sworn for the State, and she testified that she and Miss Hall (not the Miss Hall above mentioned) went to the factory on the morning of the murder; that they left the factory about 11:45 A. M., and, after having made visits to other nearby points, went for lunch to a restaurant immediately contiguous to the pencil factory; that, just as the lunch was ending, Lemmie Quinn

Upon motion of the Solicitor, the statement that Quinn had just been up to see Frank was ruled out because it was hearsay.

The defendant insisted that this statement of Quinn was made in close connection with his visit to Frank, and while he was in the very act of terminating that visit, and, therefore, was a part of the *res gestae.*

No good reason appears to us why Miss Hall was not permitted to testify how it happened that she went to the pencil factory on the day of the murder. To explain

that visit, it would be necessary for her to tell that Mr. Frank called her, the purpose for which he said he called her, and the amount of work he wished her to do.

This telephone communication which brought Miss Hall to the pencil factory took place admittedly before the murder, and before Frank could by any possibility have known of Mary Phagan's contemplated visit to the factory. The call for Miss Hall explains her going to the factory. It is a part of the *res gestae* of that transaction. It was free from all tincture of forethought or preparation. It was the natural impulse of a busy man behind with his work, seeking aid in its accomplishment.

The fact of Lemmie Quinn's visit was exceedingly important in the day's happenings. If he told the truth about the visit and the time of his call, his testimony gave great aid to the defendant. The defendant undertook to sustain Quinn's version, as to his visit and as to the time of it, by the witness Miss Freeman.

Quinn testified that he called upon Frank about 12:20 P. M.; that he left the factory and went immediately to a restaurant contiguous to the factory building and there saw and talked to Miss Freeman. Miss Freeman testified that she was in the restaurant; that Quinn came in and stated that he had just been up to call on Mr. Frank.

Beyond doubt, this statement was a part of the *res gestae* of Quinn's visit to Frank. It was an explanation, or rather an exclamation, connected with the visit, which was then being brought to a close. The declaration was not voluntarily preconceived. There was about it no suggestion of after-thought. It came spontaneously and contemperaneously with the conclusion of the visit.

"Declarations which accompany an act, and which are such as may well explain the act and be a part of it, are

admissible in evidence as a part of the *res gestae*." Code, §5179.

"Declarations which accompany an act, and which are such as may well explain an act and be a part of it, are admissible as evidence along with the act." Clayton vs. Tucker, 20 Ga., 452.

"When the defendant's manner of leaving a place is introduced to show that he was absconding, his sayings at the time of leaving, as to where he was going, is a part of the *res gestae*." Oliver vs. Wilson, 29 Ga., 642.

"Where the fact that complainant went to Rome to receive the Confederate money was proved, the reasons stated at the time for her act should have been received as part of th res *gestae*." King vs. King, 45 Ga., 644.

"Where one contention of the defendant was that the person slain went to the place of the homicide for the purpose of having a difficulty with him, it was neither hearsay nor irrelevant to allow the mother of the deceased to testify that she had asked her son to do something for her, the performance of which would require him to go to the place where the homicide occurred. Harper vs. State, 129 Ga., 770; (59 S. E. 792); Patterson vs. State, 134 Ga., 264 (67 S. E. 816)."

"What the deceased said at the door of the room in which she was beaten, on coming out immediately after the beating took place, was admissible in evidence as a part of the *res gestae*." Von Pollnitz vs. State, 92 Ga., 16.

"Declaration of a vendor of property, as to his motives for the sale, made at the time and during the progress of the sale, and even so soon thereafter as to be free from all suspicion of after-thought, are admissible evidence on a trial as to the validity of the sale." MeLean vs. Clark, 47 Ga., 24.

BIAS OF JURORS.

(Grounds 73 and 74, Page 97, Motion for New Trial).

The defendant made a vigorous attack upon the jurors

Henslee and Johenning, and especially upon the juror Henslee. The defendant had strong faith that the court below would be driven to grant a new trial upon the showing made against Henslee. A failure of the Court to do so was a great disappointment to defendant. It is confidently asserted that this Court, when it examines the showing made against Henslee, will at least sympathize with this disappointment.

Henslee was attacked both by affidavits and interrogatories.

R. L. Greemer heard Henslee say before the trial: "There can be no doubt that Frank is guilty, and I know that he is guilty . . . . . without a doubt he is guilty . . . . . without a doubt to my mind or to anyone else."

Mack Farkas, Albany, Georgia, heard Henslee, before the trial, express himself as being convinced of Frank's guilt of the murder of Mary Phagan. He used the exact words: ,'I believe Frank is guilty."

He told Julius A. Lehman, before the trial, twice, on June 2, 1913, and June 20, 1913: "Frank is as guilty as a damned dog, and ought to have his damned neck broken."

He told Samuel Aaron, in Atlanta, just after Frank's indictment: "I am glad that they indicted the God damned Jew; they ought to take him out and lynch him, and, if I get on the jury, I will."

During the month of May, 1913, he said in the presence of Leon Harrison: "I believe that Frank did kill the girl; and, if by any chance, I get on the jury that tries him, I will try my best to have him 'convicted.' "

He stated positively and affirmatively, in the presence of Shi Gray, at Sparta, Ga., that he believed Frank was guilty.

He said in the presence of S. M. Johnson, at Sparta, Ga., before the trial, that he believed that Frank was guilty

of the murder of Mary Phagan. He said this publicly and positively.

He said, in the presence of John M, Holmes, at Sparta, before the trial, that he thought Frank was guilty of the murder of Mary Phagan.

He said to C. P. Stough, before Frank's trial: "I think he is guilty, and I would like to be in a position where I could help break his damned neck."

At the same time and place, he said to W. L. Ricker that "Leo M. Frank was guilty of the murder of Mary Phagan" and denounced him bitterly and vehemently; he said: "They are going to break that Jew's neck."

He said to J. J. Nunnally, of Monroe, Georgia, that "Frank was guilty of the murder of Mary Phagan, and that if the jury should turn him loose, he would not get out of Atlanta alive."

Henslee attacked the witness Greemer upon the ground that he was not in Albany at the time testified to by Greemer, whereupon an invoice of goods, signed by Henslee and properly dated, was produced showing beyond question that he was in Albany at the time. He rushed into print with a statement that they were liars and that he had never had any conversations with them. Whereupon, the Sparta witnesses furnished a card to the public in which they warned Henslee that they would not submit to such abuse by him, to which Henslee replied, withdrawing the statement that they were liars and stating that he did have the conversations referred to by them, but pretending that it was at a time after the trial.

All the witnesses against Henslee were abundantly sustained as to good character, save only the witness Greemer. No attack was made on him until in the midst of the hear-

ing of the motion for new trial, and, for lack of time, no reply could be made.

No effort was made to attack the witnesses Lehman, Harrison, Ricker, Nunnally, Holmes, Gray and Johnson.

Against all of these witnesses the State presented only the affidavit of Henslee, supported by the affidavit of the jurors that they had discovered no evidence of bias on his part.

As to the affidavit of Harrison, there was no direct denial on the part of Henslee. If that affidavit has been met at all, it has been done only by the general assertions in an affidavit of Henslee.

We concede the law to be that, if the facts and circumstances tending to show unfairness and bias on the part of the juror is met by the oath of the juror, the Judge may, if he sees fit, believe the one juror against a multitude of witnesses. This is because the Court below, knowing all the events of the trial, with better knowledge than this Court can have of the character and standing of the juror and of his assailants is to be trusted to decide the issue of fairness and unfairness, even if, in doing so, he believed one against the many. But, as we understand the law, before the one juror can be heard against the many, he must deny, by a specific and direct denial, all the acts and circumstances charged against him.

Judge Roan did exercise his discretion in believing this man Henslee against a multitude of unbiased, unprejudiced witnesses. He did more than that, he believed him, although as to the things, alleged against him, by the witness Harrison, he did not make a direct and specific denial.

The doctrine that there must be a direct and specific denial is affirmed in the Myers case, 97 Ga., 76. In that case, Justice Atkinson reverses the Court below for lack of such denial. This case is on all-fours with that case.

Henslee made a general denial, but he made no specific denial as to the affidavit made by Harrison.

The juror, Johenning, (ground 74) was attacked as to his partiality and bias by three witnesses.

Mrs. Jennie G. Loevenhart testified "that during May, 1913, said M. Johenning met deponent and deponent's daughter on Forsyth Street, Atlanta, Ga., and then and there the said M. Johenning expressed to deponent and deponent's daughter his firm belief that Leo M. Frank was guilty of the murder of Mary Phagan. This statement was made by M. Johenning forcibly and positively and as his profound conviction."

H. C. Loevenhart testified "that during the month of May, 1913, said M. Johenning had a conversation with this deponent in which he discussed the death of little Mary Phagan. * * * * * That in said conversation the said juror, M. Johenning, expressed his opinion to deponent that Frank was guilty of the murder of Mary Phagan, and that this was his profound conviction."

Miriam Loevenhart testified "that prior to the trial of Leo M. Frank, said juror, M. Johenning, had a conversation with this deponent and deponent's mother, and in their presence expressed his profound conviction that Leo M. Frank was certainly guilty of the murder of Mary Phagan. * * * * * That said M. Johenning made this statement positively, almost vehemently, and that his exact language, which was in response to a remark from deponent in reference to the case, was, as near as deponent recalls, 'I know that he is guilty,' referring to Leo M. Frank. Said juror made this statement to your deponent more than once before the trial of Leo M. Frank for murder."

The evidence of these witnesses was met in the court below by an affidavit of the jurors that they discovered no bias on the part of Johenning, and by the affidavit of Johenning himself.

In his affidavit, Johenning, asserting his good conduct as a juror, made denial that he was partial or biased.

His denial of the testimony of the Loevenhart's supra, was as follows:

"I have read the affidavit of H. C. Loevenhart, sworn to on the 2nd day of September, 1913, before C. W. Burke. I deny positively and emphatically that I ever had any such conversation with H. C. Loevenhart at any such time and place. * * * * * I deny ever having expressed to the Loevenhart's or anyone else any opinion with reference to the guilt or innocence of the said Frank, except as hereinafter set out.

"Some time, about two weeks before the Frank case was first set for trial, which, if my memory serves me right, was about the latter part of June, 1913, I had a Miriam Loevenhart. The conversation was substantially as follows: Mrs. Loevenhart said to me: 'What do you think of the Frank case?', and I answered her, 'By the papers, they have found him guilty already'; then she said, 'I cannot look at it that way: I think he is innocent.' Then the daughter spoke up and said, 'What do you think about it, Mr. Johenning?', and I told the daughter that I thought that he would have a hard time getting loose; that things did not look very bright for him. I said 'I have only read the papers, and that is all I know about it.' Then Mrs. Loevenhart said she was afraid that he would not get a fair trial. Then I said to her that it was a little less than two weeks to the trial; then we would all know whether he was innocent or guilty. 'That was all that was said.'"

Concede the truthfulness of the affidavit of Johenning. It is nevertheless apparent that the juror did not approach the Frank trial in a very reassuring or judicial spirit. He had read the evidence as reported by the newspapers, and it was his opinion that the newspaper evidence had already found Frank guilty. In his opinion, expressed two weeks before the trial began, "Frank would have a hard time getting loose, and things did not look bright for him."

No juror occupying such a mental attitude could fairly and impartially sit in the Frank trial. As to him, Frank did not begin his trial with the presumption of innocence in his favor. He began the trial with this juror believing that things looked dark for Frank and that he would have a hard time getting loose.

It is submitted that Johenning did not meet the charges of bias made against him by specific and direct denial. That his very explanation shows that he was not an impartial, fair juror. See the Myers case, supra.

FAILURE TO CHARGE IMPEACHMENT.

(Ground 67, Page 94, Motion for New Trial.)

Error is assigned because the Court, under the facts and circumstances of this case, did not charge the jury, even in the absence of a written request, "that if a witness knowingly and willingly swore falsely in a material matter, his testimony shall be rejected entirely, unless it be corroborated by facts and circumstances of the case or other credible evidence." The usual rule is recognized that, in the absence of written request, the Court need not charge the jury on impeachment. To this general rule, however, there is a well-known exception:

"Where a witness swears to a certain state of facts upon one trial, and to the contrary upon a second trial of the same case, admitting that his testimony first given was false, it is the duty of the Court to charge the law of impeachment whether requested to do so or not." Stafford vs. State of Ga., 55 Ga. 592; Plummer vs. State of Ga., 111 Ga. 839.

This case, in the matter of impeachment, is not different from the Stafford and Plummer cases. In each of those cases, the witness twice swore in the same case; in the Stafford case, to a certain state of facts upon one

trial, and to the contrary upon a second trial of the same case; in the Plummer case the witness swore once before the grand jury to a state of facts, and upon the trial of the issue upon indictment, swore to a different state of facts. In each case, the witness admitted that his testimony given in the first instance was false.

In the present case, the witness, Conley, did not testify twice in Court, nor once before the grand jury and once in Court, but prior to the trial before the jury and while the officers were making preparation for the trial, he made for their guidance and use three affidavits; thereafter, when a witness in the issue upon indictment, he swore contrary to each and all of the affidavits and admitted that his testimony given in the affidavits was false.

Neither in law nor in logic can there be any real substantial difference between Conley's connection with this case and the relationship of the impeached witnesses to the Stafford and Plummer cases. The only possible differnce is that the first oaths of Conley were not given in the grand jury or before a Court, but that fact ought not, and cannot in reason, make any difference.

The only sensible reason for the exception is that, in the cases where it is enforced, the corruption of the witness was so glaringly marked that his relationship to the case could not be overlooked by the Court; that the stench of the witness was so great that, in very decency, the Court should call it to the jury's attention by appropriate charge.

Certainly, the same reason in this case called for a charge upon the subject of impeachment. Nowhere in all the records of this Court, can there be found record of a witness more filthily and blatantly corrupt that this negro Conley . His trail of corruption can be easily traced through the whole case.

If there was ever a case for the enforcement of the

exception, this case is the one. Not only was Conley impeached by his own boastful admission, but witness after witness swore that, from his corrupt character, they would not believe him on oath.

The Court below made no mention of the rule as to impeachments, nor did he anywhere give to the jury any rule by which they could legally measure the credibility of witnesses.

On the contrary, treating the matter as if the question of impeachment had not been involved in the case, he mildly stated to the jury that they were the sole judges of the credibility of the witnesses.

JUDGMENT OF THE COURT OVER-RULING THE MOTION FOR NEW TRIAL.

After hearing extensive argument on the motion for new trial, the same was over-ruled. In over-ruling the motion the Court rendered a judgment denying the same, and in rendering said judgment, stated "that the jury had found the defendant guilty; that he, the judge, had thought about this case more than any other he had ever tried; that he was not certain of the defendant's guilt; that with all the thought he had put on this case, he was not thoroughly convinced that Frank was guilty or innocent, but that he did not have to be convinced; that the jury was convinced, and that there was no room to doubt that. That he felt it to be his duty to order that the motion for new trial be over-ruled." (See page 69, Bill of Execptions.)

In the original motion for new trial, it was alleged that the verdict was contrary to the evidence and without evidence to support it. In passing upon this ground of the

motion, the duty devolved upon the Judge of exercising his discretion, and in doing so, he ought to have applied to the task the best of his brain, heart and conscience.

If after so doing, the verdict met with his approval, it was his duty to over-rule the motion, but if it did not meet his approbation, it was his duty to grant a new trial.

This is a duty that no trial judge can fairly shirk. The danger of doing so is appalling; the temptation to do so is very great.

This Court, keeping in mind the danger and the temptation, has repeatedly reversed the Court below when it appeared from the record that the trial Court, from timidity or from misapprehension as to the law, failed to exercise his own discretion and substituted the verdict of the jury for that discretion which it is his solemn duty to exercise.

It is, of course, true that in determining whether the Court exercised or failed to exercise his legal discretion, this Court will look solely to the record, giving full force to the presumption that the Court has exercised his discretion and that the verdict does in fact meet his approbation.

In the present case, the Court rendered an oral judgment, as will be seen from the bill of exceptions. The whole of the judgment was not incorporated in the order over-ruling the motion for new trial, but the whole of that judgment was fully set out in the bill of exceptions. In determining just what was the judgment of the Court in over-ruling the motion, this Court will look to the whole record. If the record itself and the bill of exceptions are irreconcilably inconsistent, of the two, the record will prevail.

When, however, there is no such inconsistency and it is legally possible to reconcile the record and the recitals in the bill of exceptions, this court will do so and give full

force, not only to the record but to the recitals in the bill of exceptions, as well. Doing so, there can be no doubt that Judge Roan did not sanctify this verdict by exercising that discretion which the law demands. The words of his judgment portray on his part a state of mind wholly inconsistent with that settled conviction which a trial judge ought to possess in denying a motion for new trial. He was not thoroughly convinced that Frank was guilty. He was not thoroughly convinced that he was innocent. He did not have to be convinced. Conviction was not a part of his duty; that was the province of the jury. They were convinced, and their conviction was to determine the matter, although he was still unconvinced.

What must have been the state of mind of the trial judge when he denied this motion? What a turmoil of mental doubt and vacillation must have overwhelmed him! Think of the case as he might and as much as he said he did, he was still unable to find one single yard of solid, fixed conviction upon which to stand. Try as earnestly as he could, he reached and could reach no conviction that satisfied his heart and conscience. Unsettled and perturbed, with no hope for peace or rest, he cast the whole burden upon the jury. Undoubtedly they had been convinced—he was unable to become so, and in his dilemma, he put forward the discretion of the jury as an excuse for not exercising his own. Merchants & Miners Transportation Company v. Corcoran, 4 Ga. App. 654; Rogers v. State, 101 Ga. 561; Central of Ga. Ry. Co. v. Hardin, 113 Ga. 453; Thompson v. Warren, 118 Ga. 644; McIntyre v. McnItyre, 128 Ga. 67; Griffin v. State, 12 Ga. App. 622.

PHYSICIANS ALLOWED TO GIVE INDIVIDUAL TESTS ON DIFFERENT SUBJECTS; PHYSICAL SPECIMENS RESULTING FROM SUCH TESTS ADMITTED IN EVIDENCE.

(Grounds 18 and 19, page 56, motion for new trial.)

These grounds relate to the testimony of Dr. H. F. Harris, who was put up by the State. Dr. Harris was allowed, over the defendant's objection, as throwing light on the time of the decedent's death ,and in connection with a piece of undigested cabbage which he had extracted, on post mortem, from the girl's stomach, to testify as to certain experiments he individually had made with the digestion of cabbage, and to testify that he collected a number of patients, whose stomachs were not in very good condition, and made experiments as to the time of digesting cabbage; and that he was struck with the fact that the behavior of the stomach, after taking a small meal of cabbage and bread was practically the same as with bread and water alone; and that he discovered that the ideas about the digestion of cabbage were erroneous, and that the stomach freed itself from the mixture of cabbage and bread about as easily as if the subject had taken bread alone; and in Ground 19 Harris also gave further experiments he had made after taking the cabbage from the girl's stomach, these latter experiments having been made with cabbage cooked by the mother of the dead girl, and having been given by Harris to persons whom he claimed had normal stomachs; and that upon some of them he experimented twice, there being four persons

upon whom he experimented; and that he required these persons not to chew the cabbage but to gulp it down; and he thereupon exhibited several small glass jars purporting to contain what he claimed to be partially digested cabbage, taken one in the period of thirty-eight minutes from a boy fourteen years of age and the others in periods varying up to seventy minutes.

The admission of this testimony of Dr. Harris was unfair to the defendant, and worked injury. It will be observed that after the post mortem by Harris, he picked out the patients upon whom he would experiment with the cabbage, and with four individuals made certain tests.

The state of a science is not shown by one man's individual tests, but is shown by the opinion of men belonging to that branch of learning the world over. For one man to discard all the knowledge which might be obtained from the state of the science, and possibly mislead the jury by giving a few experiments of his own, would not be to give the state of the science to the jury at all.

No one man can make a science as broad as medicine. No one man's individual experience cuts any figure except as part of the experience of the whole profession. Harris testified solely upon his experiments. He practically admitted that they were contrary to the current of authority. He was running against the state of the science.

Jurors are not experienced men usually. Their judgment and experience is generally limited, and that is the reason why the law endeavors to admit to them only the best and most direct evidence. If jurors are turned loose to consider any wild experiments by individuals they will as readily find a verdict upon it as upon real,

substantial, thoroughly ascertained facts. They are apt to be carried away by any nostrum or freakish experiment which is plausibly presented.

To allow this doctor to give his own experiments, and show the specimens taken from the stomachs of his patients, appealed to the eye of the jury, and undoubtedly had an undue weight with them. The state of the science should have had weight against this individual doctor's opinion, who was setting up his own view against the science; but for this doctor to describe his patients, to describe the administration of the cabbage to them, and to present the partially digested specimens to the jury, was a spectacular performance, which appealed to the eye of the jury, and should not have been allowed for the reason that the jury would give such performance undue weight against the well ascertained state of the science shown by numerous other physicians.

The twenty-fifth ground (Page 62, motion for new trial) of the motion should be considered in connection with the two foregoing grounds just discussed, and it complains of the introduction in evidence of the specimens of cabbage taken from the stomachs of the four persons testified to by Dr. Harris, and claimed to have been cooked by Mary Phagan's mother. For the reasons just before argued, this evidence was not admissible. It was an experiment under different conditions, and likely to be very misleading. Practically all of the evidence showed that the stomachs of individuals differ; that each stomach is a law to itself, within certain limits; that one man would have an affinity for one food, and another man an affinity for a totally different kind of food; that what was food to one was poison to another.

The Court can readily see that such a sensational performance as allowing the dead girl's mother to cook this

cabbage, to allow Dr. Harris to select four of his patients and administer the cabbage to them, and then bring the cabbage into Court and exhibit it to the jury, would have a very misleading effect. The jurors would leave out of view the fact that each individual may have been totally different in his capacity for digesting cabbage from Mary Phagan, and they also might be induced by these isolated experiments to leave out of view the general state of the science. The result in all four of the experiments made by Harris may have been exceptional, and where a great science has certain established rules, particular instances which go counter to those rules may well be looked on with skepticism.

We say that none of these experiments by Dr. Harris were admissible, nor was the cabbage admissible, but that Harris, as an expert, should have been allowed only to give the general state of the science.

COURT ALLOWS STATE TO GO INTO PARTICULARS OF QUARREL BETWEEN TWO DOCTOR-WITNESSES; ALLOWS RESOLUTION OF STATE HEALTH BOARD, SUSTAINING ONE SIDE OF QUARREL INTRODUCED IN EVIDENCE.

(Ground 48, page 80, motion for new trial.)

Ground 48 of the motion complains that the State was over objection, allowed to put in a long extract from the minutes of the State Board of Health. When Dr. Westmoreland, for the defendant was being examined the Solicitor drew out from him that he had had a controversy with Dr. Harris while both of these physicians were on the State Board of Health; and Dr. Westmoreland then stated on redirect that he had preferred charges of

scientific dishonesty before the Board of Health against Dr. Harris, and that the Board of Health had thought him guilty of the charges, but had declined to discharge him.

It will be borne in mind that the State began this subject on cross examination.

Notwithstanding the fact that the whole subject had been gone into by the State on cross examination, the Court allowed the State, in reply to Dr. Westmoreland, to put in the extract from the minutes of the State Board of Health relating to the controversy between Westmoreland and Harris, in which minutes were contained the meeting at which Dr. Westmoreland addressed the Board on his charges against Dr. Harris, and which contained the remarks by Dr. Doughty, deprecating the whole discussion, and which contained a resolution by Dr. Benedict, which was adopted by the Board, as follows:

"Resolved, that the members of the Board present, after carefully considering the charges and all evidence in its possession, unanimously agree that while there have been certain slight irregularities in the conduct of some departments of the laboratories of the State Board of Health ,which should be corrected, these irregularities have not been so important in character or result as to call for or warrant the discontinuance of Dr. Harris as secretary and director of laboratories as demanded by the President."

Upon what principle the Court admitted this evidence, it is difficult to understand.

The State having examined Dr. Westmoreland, on the cross, on this subject, was bound by his answer. It was a collateral matter. The question of the right or wrong of the discussion between Westmoreland and Harris was not an issue before the jury.

It prejudiced the defendant by taking their minds from the issue of the trial and centering them upon the row between these two physicians. This resolution at most was a mere expression of an opinion by the doctors who voted for it, and was hearsay in the rankest sense. Its prejudicial effect to the defendant was to injure the testimony of Dr. Westmoreland, and to sustain the testimony of Dr. Harris. It was a mere expression of an opinion by the doctors who voted for it, and was just as inadmissible as if they had said in court or out of court that they thought Harris was right and Westmoreland was wrong.

DISORDER AT TRIAL. INTIMIDATION OF JURY BY FREQUENT DEMONSTRATIONS AT TRIAL. COURT TAKES NO ACTION. APPLAUSE WHILE JURY IS BEING POLLED.

(Grounds 38, 64, 65, 66 and 75, pages 69, 88, 89, 91, 93, 98, motion for new trial.)

The substance of the grounds which we will now discuss relate to the conduct of the trial, and to the participation of the public, imbued with the mob spirit, in the trial, and to the overawing and intimidation of the jury by those prejudiced members of the public who frequented the Court house and the streets during this trial.

AUDIENCE BY DEMONSTRATION INTERFERES WITH COUNSEL'S EXAMINATION OF WITNESS.

In Ground 38 it appears that while defendant's counsel was examining Kriegshaber, there was laughter in the audience sufficiently generally distributed and loud

enough to interfere with the examination. Defendant's counsel called the Court's attention to the interruption for the purpose of obtaining some action from the Court thereon. The Court said that if there was further disorder no one would be permitted in the court room on the following day, and requested the sheriff to maintain order.

MISTRIAL REQUESTED BECAUSE OF NUMEROUS DEMONSTRATIONS.

Ground 64 can best be understood by being embodied herein, as follows: Because the Court erred in declining to grant a mistrial on motion of the defendant, made by his counsel, made after the argument of the Solicitor, and before the charge of the Court. The motion made by the defendant for a mistrial is as follows:

"I have a motion to make, Your Honor, for a mistrial in this case, and I wish to state the facts on which I base it, and I wish the stenographer to take it down, and we take cognizance of them without proof.

"First, that counsel requested before this trial began that he court room be cleared of spectators.

"Second, when the Court declined to rule out the evidence as to other alleged transactions with women, by Jim Conley, the audience in the court room, who occupied nearly every seat, showed applause by the clapping of hands, or stamping of feet and shouting in the presence of the Court; the jury was in a room not over twenty feet from the court room—that room back there (indicating), and heard the applause. The Court refused to

declare a mistrial or to clear the court room on motion of the defendant.

"Third, that on Friday, August 22nd, when the trial was on and the Court had just adjourned for the day, and the jury was about 200 feet from the court house proceeding north on Pryor street, as Mr. Dorsey, the Solicitor-General, was leaving the court house, a large crowd assembled in front of the court house and, in the hearin gof the jury, cheered and shouted "Hurrah for Dorsey," in the hearing of the jury.

"Fourth, that on Saturday, August 23, 1913, while the trial was still on, and when the Court adjourned and Mr. Dorsey emerged from the court room, a large crowd, standing on the street, applauded and cheered Mr. Dorsey, shouting "Hurrah for Dorsey." The jury at this time was in a cafe at lunch, about 100 feet away, and a portion of the crowd moved up in front of the cafe at which the jury were at lunch, and in the hearing of the jury shouted "Hurrah for Dorsey."

"Fifth, on the last day of the trial, a large crowd, including many women, had assembled in the court room before court opened, taking up every seat in the court room. The jury were in their room not over 20 feet from the court room, and as Mr. Dorsey entered the room, the crowd applauded loudly by clapping of hands and stamping of feet, all in the hearing of the jury. The court admonished the people that if the applause was repeated, he would clear the court room.

"Now, we move upon these facts, which tend to coerce and intimidate and unduly influence the jury, that the Court here and now declare a mistrial, and we stand ready to prove each and every fact there, and we offer to prove them. Now, if Your Hono rwill take cognizance of these facts as stated, then of course it will dispense with proof. If Your Honor does not take cognizance of them, we are ready to prove them by numbers of peo-

ple who heard them, including myself; I have heard it, all of it, and the conduct has been most disgraceful. The defendant has not been accorded anything like a fair trial and I am disgusted, may it please Your Honor, with the unfairness of those members of the public who make such an exhibition of themselves when a man is on trial for his life. I am not afraid of them; I hope nobody else is afraid o fthem; but the natural tendency is to intimidate a jury, and I have never seen a trial so hedged in and surrounded with manifestations of public opinion. I make the motion to declare a mistrial and stand ready to prove these facts. If the Court knows them, the Court can take cognizance of them.''

Upon this motion the Court stated that as to part of the facts he knew and part he did not know. That what occurred on August 25, 1913, the last day of the trial, he did know, as it took place in his presence; that he did hear cheering when Mr. Dorsey went out on the occasions mentioned, but as to what the crowd said, out of the whooping and holloing, he did not know, and that he did hear the applause in the court room when the Court declined to rule out the evidence as to several alleged transactions with women, by Jim Conley.

In support of this motion to declare a mistrial, the following evidence was introduced:

Mr. Deavours testified that he was a Deputy Sheriff of Fulton County in charge of the jury on Saturday when Mr. Dorsey was applauded in front of the court house as he left that house. When the applauding began, the jury was in or near the German Cafe, where they went to dinner. When the applause first began, they were about 100 feet from the court house, entering the cafe. That he heard the applause, but did not hear the crowd holler ''Hurrah for Dorsey''; he heard the hollering and cheering, and the

jury could have heard what he did. That the applause he heard was outside of the cafe, he did not hear the cheering from the inside of the cafe. No one came in the cafe into the room where the jury was, that is, in the room in the rear.

Mr. Arnold testified: I wish to state that on Friday when court adjourned Mr. Dorsey left the court room and as he left the court room I heard loud cheering at the front. On Saturday, when court adjourned, I asked Mr. Dorsey not to go out until the jury had gotten away from where they could hear the noise of the crowd, for fear they should cheer him again as he left the court room. Mr. Dorsey said "all right," and remained in the court room for a while. Finally, I thought the crowd had left, and I presume Mr. Dorsey thought the crowd had left, and of course I do not claim that he is responsible for the cheering, but he finally left the court room and went out, and I went out with Mr. Rosser shortly afterwards, behind him. As Mr. Deavours says, it turned out that the jury had not at that time entered the German Cafe, although I didn't see them. I saw people up there, but I didn't know who they were, but as Mr. Dorsey left the court room there were loud and excited cheers and cries of "Hurrah for Dorsey." My judgment is that you could have heard the cheers and cries of "Hurrah for Dorsey" without any trouble, all the way from the court house up Alabama street; that is my opinion. They kept cheering him, and as my friend went across the street, the cries continued until he got clear into the Kiser Building. The first cheering was on Friday afternoon, and the second time was on Saturday when I asked Mr. Dorsey not to go out. I asked Mr. Dorsey not to go out until the crowd dispersed. He stayed in; I am not trying to blame Mr. Dorsey for it. I didn't know the crowd was waiting out there, and I presumed that the jury had gotten out of hearing but found they had not. I didn't hear the case mentioned; I heard no allusion to this case, but I just heard cries of "Hurrah for Dorsey," but on the other occasions, while I love for my friend to meet all the approbation he may get from the public, I

did think it was an outrage, the crying and shouting; that is what I thought; if the jury were where Mr. Deavours said they were, they could hear; no trouble about hearing it, if they had good ordinary hearing. On Friday I was in the court room when I heard most of the crying; I do not know where the jury was then.

Charles F. Huber testified: I was in charge of the jury when they left the court room Friday afternoon. I do not know how far the jury had gotten before the crowd began cheering in front of the court house. I didn't know myself that they had cheered until the next morning. They didn't know it at all. I had charge of the rear end of the jury. I have good hearing, and I heard no cheering.

After hearing the above evidence and motion the Court overruled the motion for mistrial.

DEMONSTRATION OCCURS EVEN WHILE THIS MOTION BEING MADE.

During the hearing of this motion for a mistrial, and when the witness Charles F. Huber was on the stand, and swore that he heard no cheering on the Friday afternoon referred to, and that the jury did not hear it, there was applause among the spectators, on account of the statement that the jury did not hear the cheering. Mr. Arnold called attention to the applause stating to the Court that the crowd could not be held in even while they were making this investigation.

The Court paid no further attention to this applause than to ask, "What is the matter with you over there?"

In failing to grant the mistrial requested, the Court erred. The motion, taken in connection with the admitted and proven facts, movant contends, clearly shows that the defendant was not having a fair trial by reason of the great excitement of the crowd. The court room was in an exceedingly small building, on the ground floor, and

was crowded during the whole of the trial, and defendant contends that this prejudice and animosity of the crowd against him, as shown by the frequent applause necessarily reached the jury box and prevented him from having a fair trial."

SEVERAL DEMONSTRATIONS IN COURT ROOM DURING THE TRIAL.

Ground 65 reads as follows:

Because the defendant contends he did not have a fair and impartial trial, by an impartial jury, as provided by the Constitution and laws of this State, for the following reasons, to-wit:

APPLAUSE WHEN CONLEY'S EVIDENCE RULED ADMISSIBLE.

(a) On August 6, 1913, during the trial, the defendant's counsel moved to rule out the testimony of the witness Conley, tending to show acts of perversion and acts of immorality on the part of the defendant, wholly disconnected with and disassociated from this crime. The Court declined to rule out said testimony, and immediately upon the statement of the Court that he would let such testimony remain in evidence before the jury, there was instant, pronounced and continuous applause throughout the crowded court room where the trial was being had, by clapping of hands and by striking of feet upon the floor.

While the jury was not then in the same room where the trial was being had, they were in a room about 50 feet from where the judge was sitting and about 20 feet from portions of the crowd applauding, and so close that perhaps the jury could have heard the applauding.

APPLAUSE WHEN COURT MAKES RULING ON EVIDENCE AGAINST DEFENDANTS COUNSEL.

(b) And again during the trial, Mr. Arnold, one of the counsel for the defendant, in the presence of the jury, objected to a question asked by the solicitor, and the following colloquy took place:

Mr. Arnold: I object to that, Your Honor, that is entering the orders on that book merely; that is not the question he is asking now at all.

The Court: What is the question he is asking now?

(Referring to questions asked by the Solicitor-General.)

Mr. Arnold: He is asking how long it took to do all this work connected with it. (Referring to work done by Frank the day of the murder.)

The Court: Well, he knows what he is asking him. (Referring to the Solicitor-General.)

Upon this suggestion of the Court that the Solicitor knew what he was doing, the spectators in the court room applauded by striking their hands together and by the striking of feet upon the floor, creating quite a demonstration. Defendant's counsel complained of the conduct of the spectators in the court room. The Court gave no relief except directing the sheriff to find out who was making the noise.

CROWD JEERS DEFENDANTS COUNSEL BY LAUGHTER.

(c) During the examination by Mr. Arnold, counsel for the defendant, of V. H. Kriegshaber, a witness for the defendant, there was laughter in the audience sufficiently generally distributed throughout the audience and loud enough to interfere with the examination. Mr. Arnold

called the Court's attention to the interruption for the purpose of obtaining some action from the Court thereon.

The Court stated that if there was other disorder, no one would be permitted in the court room the following day, and requested the sheriff to maintain order.

CROWD IN STREET APPLAUDS SOLICITOR IN JURY'S HEARING.

(d) That during the trial on Friday, August 22nd, 1913, when the Court had just adjourned for the day, and the jury was about 200 feet away from the court house, proceeding north on Pryor street, as Mr. Dorsey, the Solicitor-General, was leaving the court room, a large crowd assembled in front of the court house, and in the hearing of the jury cheered and shouted "Hurrah for Dorsey."

AGAIN IS SOLICITOR CHEERED IN STREET IN JURY'S HEARING.

(e) That during the trial, on Saturday, August 23 1913, when Court adjourned and Mr. Dorsey emerged from the court room, a large crowd, standing on the street, applauded and cheered him, shouting "Hurrah for Dorsey." At that time the jury was between the court house and what is known as the German Cafe, and near enough to the crowd to hear the cheering and shouting. A portion of the crowd moved up in front of the cafe at which the jury were at lunch, and in the hearing of the jury shouted "Hurrah for Dorsey."

CROWD IN COURT ROOM APPLAUDS AS SOLIC-
-- ITOR ENTERS ON LAST DAY OF TRIAL.

(f) On the last day of the trial, Monday, August 25th, 1913, a large crowd, including many women, had assembled in the court room before court opened, taking up

every seat in the court room. The jury were in their room about 20 feet from the court room, and as Mr. Dorsey entered the room the crowd applauded loudly by clapping of hands and stamping of feet, which the jury perhaps could have heard. The Court did nothing but admonish the people that if the applause was repeated he would clear the court room.

CROWD IN STREET AGAIN APPLAUDS SOLICITOR.

(g) On Monday, the last day of the trial, after the argument of counsel had been had and the charge of the Court had been given, and the case was in the hands of the jury, when Solicitor Dorsey left the court room a very large crowd awaited him in front of the court house and shouted and applauded by clapping their hands and shouting, "Hurrah for Dorsey."

CROWD CHEERS WHILE JURY BEING POLLED, IN JURY'S HEARING, RENDERING IT DIFFICULT FOR COURT TO PROCEED WITH POLL.

(h) When it was announced that the jury had agreed upon a verdict, the Judge of the Superior Court, His Honor L. S. Roan, went to the court house, which was a comparatively small room on the first floor, at the junction of Hunter and Pryor Streets and found the court room packed with spectators. Fearful of misconduct among the spectators in the court room, the Court, of his own motion, cleared the room before the jury announced their verdict. When the verdict of guilty was rendered, the fact of the rendition of such a verdict was signalled to the crowd on the outside, which consisted of a

large concourse and crowd of people standing upon Hunter and Pryor Streets. Immediately upon receiving such signal, and while the Court was engaged in polling the jury, and before the polling had ended, great shouts arose from the people on the outside, expressing gratification. Great applauding, shouting and halloing was heard on the streets, and so great became the noise on the streets that the Court had difficulty in hearing the responses of the jurors as he polled them. The jurors, in affidavits taken by the State, admitted they heard this applause. These incidents showed, as the defendant contends, that the defendant did not have a fair and impartial jury trial, and that the demonstration of the crowd attending court was such as to inevitably affect the jury.

SAME SUBJECT—CONTINUED.

Ground 66 reads as follows:

Because that fair and impartial trial guaranteed him by the Constitution of this State, was not accorded the defendant, for the following reasons:

The court room wherein this trial was had was situated at the corner of Hunter and Pryor streets. There are a number of windows on the Pryor Street side looking out upon the street, and furnishing easy access to any noises that would occur upon the street. The court room itself is situated on Hunter Street, 15 or 20 feet from Pryor Street. There is an open alley-way running from Pryor Street along by the side of the court house, and there are windows from the court room looking on to this alley, and any noise in the alley can easily be heard in the court room. When Solicitor Dorsey left the court room on the last day of the trial, after the case had been submitted to the jury, a large and boisterous crowd of several hundred people was standing in the street in

front of the court house, and as he came out greeted him with loud and boisterous applause, taking him upon their shoulders and carrying him across the street into the Kiser Building, wherein was his office. This crowd did not wholly disperse during the interval between the giving of the case to the jury and the time when the jury reached its verdict, but during the whole of such time a large crowd was gathered at the junction of Pryor and Hunter Streets. When it was announced that the jury had reached a verdict, His Honor L. S. Roan, went to the court room, and found it crowded with spectators to such an extent as to interfere with the Court's orderly procedure, and fearing misconduct in the court room, His Honor cleared it of spectators. The jury was then brought in for the purpose of delivering their verdict. When the verdict of guilty was announced, a signal was given to the crowd on the outside to that effect. The large crowd of people standing on the outside cheered and shouted and hurrahed at the outset of the poll of the jury, and before more than one juror had been polled, to such an extent that the Court had some difficulty in proceeding with the poll of the jury, which was then in progress, and not finished. Indeed, so great was the noise and confusion without that the Court heard the responses of the jurors during the polling with some difficulty. The Court was about ten feet from the jury. In the court room was the jury, lawyers, newspaper men and officers of the Court, and among them there was no disorder.

The polling of the jury is an important part of the trial. It is inconceivable that any juror, even if the verdict was not his own, would announce that it was not, in the midst of the turmoil and strife without.

SAME SUBJECT—CONTINUED.

Ground 75 reads as follows:

Because the defendant, as he contends, did not have a fair and impartial jury trial, guaranteed to him under the laws of this State, for the following reasons, to-wit:

Public sentiment seemed to the Court to be greatly against him. The court room was a small room, and during the argument of the case, so far as the Court could see, about every seat in the court room was taken, in and without the bar, and the aisles at each end of the court room were packed with spectators. The jury, in going from the jury seats to the jury room, during the session of the court, and in going to and from the court room morning, evening, and noon, were dependent upon passage ways made for them by the officers of the Court. The bar of the court room itself was crowded, leaving only a small space to be occupied by counsel in their argument to the jury. The jury-box, when occupied by the jury, was inclosed by the crowd sitting and standing in such close proximity thereto that the whispers of the crowd could be heard during a part of the trial. When the Court's attention was called to this he ordered the sheriff to move the crowd back, and this was done.

During the argument of the Solicitor, Mr. Arnold, of counsel for the defense, made an objection to the argument of the Solicitor, and the crowd laughed at him, and Mr. Arnold appealed to the Court.

On Saturday, prior to the rendition of the verdict on Monday, the Court was considering whether or not he should go on with the trial during Saturday evening, or to what hour he should extend it in the evening, the excitement in and without the court room was so apparent as to cause apprehension in the mind of the Court as to

whether he could safely continue the trial during Saturday afternoon; and in making up his mind about the wisdom of thus continuing the trial, His Honor conferred with, while on the Bench, and in the presence of the jury, the Chief of Police of Atlanta, and the Colonel of the Fifth Georgia Regiment, stationed in Atlanta, conferred with His Honor. Not only so, but the public press, apprehending trouble if the case continued on Saturday, united in a request to the Court that he not continue the Court on Saturday evening. The Court, being thus advised, felt it unwise to extend the case on Saturday evening, and continued it until Monday morning. It was evident on Monday morning that the public excitement had not subsided, and that it was as intense as it was on Saturday previous. The same excited crowds were present, and the court house was in the same crowded condition. When the Solicitor entered the court room he was met with applause by the large crowd—ladies and gentlemen present, by stamping their feet and clapping their hands, while the jury were in their room about twenty feet away.

While Mr. Arnold, of the defense, was making a motion for a mistrial, and while taking testimony to support it before the Court, the crowd applauded when the witness testified that he did not think the jury heard the applause of the crowd on Friday of the trial. The jury were not in the court room, but were in the jury room about 20 feet away.

When the jury was finally charged by the Court, and the case submitted to them, and when Mr. Dorsey left the court room, a large crowd on the outside of the court house, and in the streets, cheered by yelling and clapping hands and yelling "Hurrah for Dorsey."

When it was announced that the jury had agreed upon a verdict, crowds had thronged the court room to such

an extent that the Court felt bound to clear the court room before receiving the verdict. This the Court did. But, when the verdict of the jury was rendered, a large crowd had thronged the outside of the court house; someone signaled to the outside what the verdict was, and the crowd on the outside raised a mighty shout of approval. So great was the shouting and applause on the outside that the Court had some difficulty in hearing the response of the jurors as he called them.

The defendant was not in the court room when the verdict was rendered, his presence having been waived by his counsel. This waiver was accepted and acquiesced in by the Court, because of the fear of violence that might be done the defendant were he in Court when the verdict was rendered.

When Mr. Dorsey left the court room, he was met at the court house door by a multitude, was hurrahed, cheered, taken upon the shoulders of a part of the crowd, and carried partly to the building opposite, where he had his office.

This defendant contends that the above recital shows that he did not have a fair and impartial jury trial; that a new trial ought to be granted; and that the Court, failing to grant such a new trial, will commit error.

DISCUSSION OF GROUNDS DEALING WITH DEMONSTRATIONS BY PUBLIC.

From the grounds we have just quoted it appears that a motion had been made by the defendant to rule out the testimony of the negro, Jim Conley, as to perversion. There was considerable argument upon it. The court room was crowded. The Court had sent the jury into a little side room not over twenty feet from the court room.

Finally, the Court decided against the defendant, and allowed Jim Conley's evidence as to two alleged filthy transactions to come into the case.

So delighted was the audience at the prospect of Frank being deluged with this torrent of filth that, as the Court certifies, the crowd, who occupied nearly every seat, applauded by the clapping of hands and striking of feet upon the floor, and the applause was instant, pronounced and continuous throughout the court room. The Court certifies that when this occurred the jury were in a room about fifty feet from where the judge was sitting, and about twenty feet from portions of the crowd applauding, and so close that perhaps the jury could have heard the applauding.

Again, while the Solicitor was examining a witness, defendant's counsel objected to a question, and upon the Court overruling the objection and allowing the question to be asked by saying in reference to the Solicitor-General "he knows what he is asking him," the crowd was so delighted at the apparent rebuff of defendant's counsel and the sustaining of the Solicitor-General, that the spectators in the court room applauded by striking their hands together, and by stamping their feet upon the floor, creating quite a disturbance and demonstration in the jury's presence.

The defendant's counsel complained of this conduct of the spectators in the court room. The Court gave no relief except to direct the sheriff to find out who was making the noise.

In reference to both of the foregoing transactions, it will be observed that the defendant applied for instant relief. In the instance where the crowd applauded the letting in of Jim Conley's evidence, the defendant's counsel moved to declare a mistrial, and the Court refused

to either declare a mistrial or clear the court room of spectators.

In the instance where the crowd applauded the overruling of objection of defendant's counsel to the Solicitor's question, in the presence of the jury, the defendant's counsel complained of the conduct of the spectators, and the court gave no relief as just stated, except to direct the sheriff to find out who was making the noise.

Again, it appears from these grounds that when counsel for defendant was examining the witness, V. H. Kriegshaber, that there was laughter in the crowd sufficiently generally distributed to interfere with the examination, and upon counsel for defendant calling attention of the Court to the interruption for the purpose of obtaining some action from the Court thereon, the Court only stated that if there was other disorder no one would be permitted to be in the court room the following day, and requested the sheriff to maintain order.

Again, towards the last of the trial, and when the jury was being carried from the court room to dinner half a block away, a large crowd in the street applauded the Solicitor-General as he emerged from the court room, shouting "Hurrah for Dorsey," the jury being near enough to the crowd to hear the cheering and shouting.

Again, on the last day of the trial, the court room was crowded with people, the jury being in their room about twenty feet from the court room. As the Solicitor-General entered the court room the crowd applauded loudly by clapping of hands and stamping of feet which, the judge certifies, the jury perhaps could have heard. The Court did nothing but admonish the people that if the applause was repeated he would clear the court room.

It will be observed that when the disorders hereinbefore mentioned occurred, the defendant's counsel asked

for relief, requesting the Court to take action, requesting mistrials, requesting the clearing of the court room, and the like.

On the last Saturday of the trial so tense was the situation that the Judge conferred, in open Court, in the jury's presence, with the Atlanta police chief and the colonel of the Fifth Georgia Regiment. At the request together the grounds hereinbefore stated.

On the last day of the trial, and after the various disorders in the court room herein mentioned had occurred, the defendant made the motion set forth in Ground 64 of the motion for new trial, to declare a mistrial, grouping together the grounds hereinbefore stated. At the request of the editors of the daily newspapers, the Court had adjourned from Saturday until Monday for fear of mob violence.

This motion the Court refused.

After this motion was made, on the last day of the trial, and after the argument of counsel, and charge of the Court, and when the jury were considering the case, and when Solicitor Dorsey left the court room, the very large crowd waiting in front of the court room shouted and applauded, and cried "Hurrah for Dorsey," and a large and boisterous crowd of several hundred people, standing in the street in front of the court house, took Mr. Dorsey on their shoulders and carried him across the street to his office. This crowd did not disperse during the interval between giving the case to the jury and the rendition of the verdict; and during the whole of the time the jury were considering their verdict, a large crowd was gathered on Pryor and Hunter Streets where the court house stands.

When Judge Roan went to receive the verdict, he found the court room so crowded with spectators that he

feared disorder, and cleared the court room. When the jury rendered their verdict a signal was given to the crowd on the outside by someone as to what the verdict was. A large crowd of people standing on the outside cheered and shouted to such an extent that it was with difficulty that the Court heard the responses of the jurors to the polling of the jury. The shouting and halloing of the crowd began before more than one juror had been polled, and during the polling of the jury so great was the noise and confusion that the Court heard the responses of the jurors with some difficulty.

All this is certified to by the Court.

AUTHORITIES DEMAND NEW TRIAL FOR PUBLIC DEMONSTRATIONS.

In view of the facts stated, can the Court doubt that this was a mob trial rather than a jury trial? Can the Court doubt that the heated passions of these lawless people, who invaded the court room, and who packed the streets, and who let their feelings come to the surface so plainly, influenced and drove this jury into this verdict?

The rule is well settled that it is the duty of the Court to protect the jury from the influence of demonstrations by the public. If the Judge has failed to exercise this duty to the proper extent, and the appellate court can see that injury has probably been done, then the judgment will be reversed. If, on the other hand, the Judge below has acted with sufficient firmness to counteract and neutralize, in effect, the demonstration by the public, and if the appellate court can see that the effect of the demonstration was thus neutralized, then the judgment will be affirmed.

In 12th Cyc., 522, the doctrine is stated in the text as follows:

"The applauding by bystanders of the argument and remarks of the State's attorney, and any systematic exhibition of their dislike of the defendant, made in the presence of the jury, should be promptly suppressed by the presiding judge. And the Court should pursue the same course where bystanders cause interruptions and make remarks prejudicial to the accused."

In 21st Ency. of Pleading and Practice, page 1001, is the following statement in the text:

"It is the duty of the trial court promptly to check unseemly demonstrations of applause in the court room, such as may be calculated unduly to impress and influence the jury trying the case."

In the case of Manning vs. State, 37 Tex. Crim., 180 (cited in note in 21 Ency. of Plead. & Prac., p. 1002), same case, 39 Sou. West., 118, the Court says:

"The bill of exceptions shows that said conduct was repeated without hindrance on the part of the court, until counsel for appellant was compelled to call the court's attention to the matter, and take a bill of exceptions. And even after this the audience indulged in still more boisterous applause at the conclusion of the argument of State's counsel. By some effort this could have been prevented. On the first occasion the parties should have been reprimanded and warned. On the second offense some of them should have been identified and fined. Such conduct should not be permitted in a court of justice, during the trial of a case, especially of this character, when the minds of the jury are liable to be easily excited and inflamed by such conduct on the part of the audience."

This question has been dealt with by various courts, and nowhere more clearly than in the Georgia case of Woolfolk, reported in 81st Georgia, page 552, and in the opinion granting a new trial, on pages 558, 559, 560 and 561, the Court says:

"We grant a new trial in this case with less reluctance, because of the facts alleged in the 19th and 20th

grounds of the motion for a new trial. They are, in substance, that at the conclusion of the opening argument for the State, the crowd in the court room applauded. The judge took no notice of this applause, except to rap with his gavel. And when counsel for the State was making the concluding argument, from the crowd in the rear of the court room came, in an excited and angry tone, the cry 'Hang him! Hang him! Hang him,' and some of the crowd arose to their feet. The Court rapped with his gavel and ordered the persons removed, but states that he does not know whether his order was carried into effect by the sheriff or not. Shortly after, another person sitting within the bar and near the judge cried out 'Hang him.' The Court ordered him removed, and he was carried down the back stairs. It is not known whether the jury knew this person was taken out or not. All the jurors make affidavit that these things had no influence upon their minds; and from my knowledge of the character of these gentlemen, I have no doubt that they believe this to be true. But can any man say with certainty that such things have no influence upon him? Can any of us know how far our minds are influenced by applause or excitement in a crowd which surrounds us? Can any of us say, even in this Court, that this or that piece of testimony, or this or that argument of counsel, has not influenced our minds? Can any of us say that, on the trial of one of the most heinous crimes ever committed in this State or any other, the applause of the crowd, the fierce cries of 'Hang him, hang him,' from members of the crowd ,followed later on by a repetition of the same cry from the lips of one of the most highly respected and esteemed citizens of the community would have no influence upon our minds? Our minds are so constituted that it is impossible to say what impression scenes of this kind would make upon us, unless we had determined before hand that the prisoner was guilty or innocent. The question here is not what effect these things did have upon the minds of the jury but what effect they were calculated to produce. We cannot determine

what effect they did have, but it is apparent what effect they were calculated to have.

"But counsel for the State argued before us that the defendant had no right to complain of these things. Whether this be so or not, we think the Court below should have put the seal of its condemnation upon this conduct. We think the judge should have stopped the argument of the State's counsel then and there, and ascertained the guilty parties, and should have punished them to the extent of the law. He should have taught them that the law was supreme; that the trial of a man for his life, however heinous the crime charged against him might be, was a serious and solemn thing, and that the law would not permit a mob to interfere, either by applause or by threatening and exciting cries. By so doing he would have upheld the majesty of the law, and would have shown to the jury that whatever verdict they might find, the law would protect them. It would also have shown them that the Court was uninfluenced by the feelings or demonstrations of the crowd; that it was still able to administer justice and to give the accused a fair and impartial trial. It would have given them a moral support, and would have tended to impress upon them the necessity of resisting such influences.

"On this subject see Cartwright vs. State, 16 Tex. Court of App., 473 (49 Am. Rep., 826). The defendant in that case was on trial for murder, and at the conclusion of the opening address of counsel for the prosecution, the audience applauded. The Court did not reprimand the audience, or express disapprobation of the improper demonstration, nor was the jury cautioned against suffering this conduct of the audience to influence their minds in the consideration of the case. In his concluding argument, counsel for the prosecution referred to this demonstration in terms of approval, and still the jury were not admonished by the Court to disregard this extraneous matter and to guard themselves against being influenced by it. In passing upon this, the Court of Appeals say, Willson, J., delivering the opinion: 'It is un-

necessary for us to determine whether or not we would suffer this conviction to stand if this exception presented the only ground of reversal. It is enough for us to say now that we think the Court should have taken prompt and decisive action on the occasion, and should have endeavored by its condemnation of the proceeding, and its admonitions to the jury, to prevent any prejudice to the defendant by such reprehensible conduct. And in this effort on the part of the Court counsel for the State should have united. As the matter is presented to us by the bill of exception, we cannot say that the defendant has had a fair and impartial trial upon the law and the evidence of the case.' See also 44 Am. Rep., 29 and 48 Am. Rep., 334, and authorities cited.

"We cannot say that this jury was influenced by any of these things, but will say that in all trials, either civil or criminal, the trial 'is not to be affected or influenced by the clamor of the crowd, the pressure of public sentiment, or the thousand or more rumors that almost invariably attend every case of notoriety. There is no nobler spectacle than that of a judge and jury who quietly but firmly, in the face it may be of public sentiment and popular clamor, go forward and do their duty and their whole duty.' "

It does not appear, in the Woolfolk case, that any motion for a mistrial was made by the defendant because of the demonstration, and counsel for the State, as is shown in the opinion, on page 560, argued that the defendant had no right to complain of these things.

In the case at bar, complaint was made at every stage matter would be brought to the Court's attention, and motions for mistrial were made, on two distinct occasions. A final motion for mistrial on the last day of the trial called the Court's attention to every act of disorder which had occurred up to that time and covers all of the disorder described in this record, except the disorder

which occurred on the street while the jury was being polled in the absence of defendant and his counsel.

The proper motions and complaint having been made, can it be doubted but that the Judge did not act with sufficient firmness and spirit in this case?

Some of the applause happened in the court room right in the presence of the jury. When the Court overruled the objection of defendant's counsel to one of the Solicitor's questions, remarking that the Solicitor knew what he was saying, the applause in the audience that occurred was right in the presence of the jury.

Likewise was the applause which occurred when counsel was examining the witness Kriegshaber.

On two other occasions the applause was in the court room when the jury was in an adjoining room close enough, so the Judge certifies, that the jury might have heard it; and this Court, from the proximity of the jury room, is bound to hold, as matter of fact, that the jury could have heard it, it being only twenty feet from the court room.

The Judge also certifies that while the jury was being polled, the applause and disorder which then occurred was so great that he could hardly poll the jury, and, of course, the jury heard this. The jurors, in affidavits taken by the State, admit they heard these demonstrations while being polled. They deny they were influenced.

Can there be any doubt of the effect of such conduct on the jury?

As Judge Simmons remarked in the Woolfolk case, can any juror swear as to what effect such things had upon his mind? As the Court says, in the Woolfolk case, it is not a question of what effect these things did have upon the minds of the jury in the individual case, but

the question is what effect were such things calculated to have?

The truth is that the conduct of the audience, continued and repeated as it was, without any firm action or rebuke by the Court, made the trial practically one by the public. It is better to try a man straight out by the mob than to have him tried in Court and have the jury influenced and intimidated by the mob. If the mob is to try the prisoner the Court should wash its hands of the matter altogether.

In this case, Judge Roan should have cleared the court room. He should have summoned sufficient force to keep the crowds from collecting in the street. He should have punished, to the extent of the law, by imprisonment, every person applauding and stamping his feet and crying out in the court room; and finally, these measures failing, he should have granted a mistrial, and have held the trial at a time and place when it would be free from such unseemly influences.

There is plenty of authority in the Court to clear a court room. The conduct of this crowd would have given the Judge full authority to do so, in the exercise of his discretion.

The turn which this case took under the evidence of the negro, Jim Conley, who testified to acts of perversion, brought this case squarely under Section 5885 of the Code of Georgia, as a case where the evidence was vulgar and obscene, and relates to improper acts of the sexes, and tends to debauch the morals of the young ,and the Judge had the right, either in his own discretion, or on motion of either side, to clear the court room from all members of the public.

Besides, the right to a public trial does not mean that the public shall remain in the court room if they are dis-

orderly. The inherent power of the Court to protect itself from outside influence, would give the right to exclude the public under such circumstances.

In the Myers case, 97 Georgia, page 76, it was held that the right to a public trial did not mean that a vast multitude should be in attendance, and on page 99 of the opinion the Court say that if these crowds which assembled at the trial were such as by their conduct to interfere with the due administration of the law that "the Court should adopt proper measures of repression."

In the Alabama case of Lide vs. State, 31st Sou., 953, the Court cleared the court house because of applause of remarks of the State's counsel, and the defendant excepted, presumably upon the ground that the public was entitled to remain in the court room, and that he was not given a public trial. This objection was overruled by the Supreme Court of Alabama, and the Court says as follows, on page 959:

"We see no ground for objection in the Court's action in clearing the court house because of applause in the audience of remarks of the State's counsel. This action was beneficial, rather than prejudicial, to the defendant. There was no deprivation of a public trial. What was done was for a proper and orderly administration of the law. It was not only the power, but the duty, of the Court to prevent demonstrations of approval or disapproval by spectators in the trial of causes, and if need be to this end to exclude the offending parties from the court house."

In the Georgia case of Burns vs. State, 89 Georgia 527, some of the spectators made demonstrations of approval of the argument of the State's counsel, which were not distinctly heard by the presiding judge, and of which the Court did not know the import, and his attention was not called to the same by counsel, or otherwise. It was held, under this state of facts, that the defendant

could take no advantage of the applause. Of course, the Burns case is totally different from the case at bar, because here the Court's attention was called to the matter repeatedly, and proper motions made by defendant's counsel.

JUDGE BELOW TOOK NO ACTION TO RESTRAIN DEMONSTRATION.

That Judge Roan did not meet the occasion with sufficiently drastic action is held, we think, by a number of cases. Judge Roan never once took any action but merely stated in a very mild way that he would do it if the disturbances occurred again. He admonished the crowd once or twice that he would clear the court room but the disturbances were repeated and the court room was never cleared.

SOME CASES WHICH ARE CONTROLLING.

One of the best considered cases in the books upon the duty of trial judges is Patten's case reported in 117 Ga., 238. The comment which the Supreme Court made upon the act of the Court below in allowing the mother of the young deceased boy, during the argument, to take the shirt of the deceased and show where the bullets went through is very much in point here. Judge Lamar goes to the extent of saying that the judge should act without any motion being made. We quote the following from this decision:

"The deceased was a young boy. The circumstances of killing were so wanting in every mitigating circumstance, there was such an absence of motive, such a malicious deliberation in the shooting that it must have appealed profoundly to the heated temper of the community in which the family of the young boy lived. There

was nothing needed to arouse the sympathy or to excite the indignation of those conducting the trial but, during the argument for the State, the shirt of the young boy who had been killed was handed to his mother and she was requested to take it and show to the jury where the bullets went through and where the blood had stained the garment. The scene was far more dramatic than when Antony held the garment of Caesar before the Roman crowd, and with studied eloquence said, "See what a rent the envious Cassius made." Here it was no Antony, but the mother who pointed out the rents and blood stains; and, bathed as she was in tears and sobbing out her grief before the jury their indignation must have been kindled to fever heat. And we doubt not that the verdict was greatly influenced by this transaction; and had a motion for a mistrial been made at the time the Court would no doubt have granted it. Nothing in the Code has in any way lessened the power of the trial judge to see that cases are conducted in an orderly manner. The constitution guarantees to every defendant a fair and impartial trial. Every litigant is entitled to the same right and he does not get it where any influence except the law and the evidence is allowed to affect the minds of the jury. Hisses, cheers, demonstrations, improper appeals, argument not warranted by the evidence, and the like, all constitute an impairment of the right to a fair trial. When such things happen counsel for the injured party is necessarily in a dilemma. Shall he let the trial proceed? The jury may not have been enough influenced by the occurrence to render an adverse verdict; there is at least a chance of success. Shall he ask of the jury to retire, and move for a mistrial? The motion may not be granted, and he feels that the jury would know what he had done in their absence, and to the injury already done might be added whatever unfortunate result might be produced upon their minds by an unsuccessful motion, the making of which they might impute to conscious weakness, rather than to a sole desire to remove the impression produced by the improper conduct. Or shall he press for his mistrial? The remedy is often worse than the disease. The

defendant may be in jail. Great time and expense may have been incurred in securing the witnesses; yet he may be still willing to insist on the motion, and it may be granted with the result that there must be a new trial at the next term and a loss of the labor and expense and time already consumed and the far more serious effect on the public mind. Such things ought not to occur. Where possible, they should be nipped in the bud before they have had time to ripen into damage. It is not necessary to wait for either party to object. The court itself has an interest. The public has an interest, and it is a high privilege which the judge has to act on his own motion. Civil Code, Sec. 4419; Aug. R. Co. v. Randall, 85th Ga., 319; Farmer v. State, 91 Ga., 720. Where the court acts without being asked, the remedy is far more effective, and in most cases will undo what has been improperly done. Such promptitude will generally obviate the necessity of declaring a mistrial. If, however, the Court does not act on its own motion, the injured party may take such action as he thinks appropriate. If he asks that the Court rebuke what has been done, with an instruction that the jury should disregard the occurrence and not allow it to influence their verdict, but fails to ask a mistrial, this court cannot usually grant any further relief."

Another instructive case is that of O'Dell vs. the State in 120 Ga., page 152 and in which the Court uses the following language:

"The public interest demands that all trials shall be conducted with absolute freedom from impropriety and disorder on the part of those engaged therein, as well as those who may be present merely as spectators. Nothing is more conducive to respect for the law and its administration than orderly and proper conduct of court and counsel during the progress of a trial. The judge, as the representative of the public and the exponent of the law, has conferred upon him the high privilege to interpose at any time to preserve the dignity of the court over which he is presiding, or to protect the rights of parties whose

interests may be imperiled by any occurrence in his presence; and he is not bound to and should not await the action of party counsel, or anyone else, when an act of disorder or impropriety occurs."

Still another case much in point is Collier vs. the State, 115 Ga., page 803. In this case it was held that whether the verdict was or was not supported by the evidence, the accused did not have a fair and impartial trial, and for that reason, the verdict would be set aside. In this case, while the prosecutrix alleged to have been wronged, was on the stand testifying, the crowd in the court house became very much excited, got up on their seats and looked and moved toward where the defendant was sitting. The trial judge commanded them to be seated, which was obeyed after a little while. Subsequently, counsel for the accused moved the court for a mistrial on account of this demonstration, which was declined. Affidavits were also read as to demonstrations, both within and without the court room during the course of the trial. The Bailiffs in charge of the jurors, as well as each of the jurors, testified that they heard no demonstrations, that the noise in the court house had no effect upon them and that they were controlled alone by the evidence in the case; that they did not believe that any of the noise was meant to apply to the jury. Judge Little says:

"This evidence clearly established that a second demonstration was made by the crowd; that is to say, that after the jury had been charged and had retired to consider their verdict, a very considerable number of people assembled in the court room near to which was the jury room and in the yard of the court-house, and acted in a very boisterous manner. It cannot be doubted from the evidence that this demonstration was made against the accused, and it is more than inferable that the purpose of the demonstration was to secure from

the jury a verdict of conviction. It would be mere idle talk to say that the jurors did not understand that the demonstration was against the prisoner on trial. It is true that each of the jurors testified that the noise and demonstration made by this crowd did not affect his verdict. Indeed all of them but one testified that, while they heard the noises, they could not understand what was said. One of them did clearly understand that some persons in the crowd threatened violence to the prisoner if the jury did not return a verdict of guilty. It is a little significant that the two bailiffs who were in attendance on the Court testified that they were watchful to see that no trouble occurred in the way of lynching, showing evidently that there was a fear that the prisoner would be lynched; and it is fair to assume that these fears were occasioned by the demonstrations of the crowd. We have no reason to ,and do not doubt that each member of the jury who testified was sincere and honest in his belief that his verdict was in no way affected by the demonstration during the progress of the trial, or by that which subsequently occurred while the jury were considering their verdict. But the question is not whether in fact the jurors were influenced by these demonstrations but were the demonstrations calculated to influence the jurors in their action? In the case of Woolfolk vs. State, 81 Ga., 511, our present Chief Justice who delivered the opinion in that case—referring to a demonstration made by someone in the court room, who during the progress of the trial cried out in an excited and angry tone "Hang him! Hang him! Hang him!" said 'All the jurors make affidavit that these things had no influence upon their minds. -------But can any man say with certainty that such things have no influence upon him? Can any of us know how far our minds are influenced by applause or excitement of a crowd which surrounds us? Can any of us say, even in this court, that this or that piece of testimony, on this or that argument of counsel has no influenced our minds? Can any of us say that, on the trial of one of the most henious crimes ever committed in this State or any other, the applause of the crowd, the

fierce cries of "Hang him! Hang him!" from members of the crowd, followed later on by a repetition of the same cry———would have no influence upon our minds? Our minds are so constituted that it is impossible to say what impression scenes of this kind would make upon us, unless we had determined beforehand that the prisoner was guilty or innocent. The question here is, not what effect these things did have upon the minds of the jury, but what effect they were calculated to have."

In the case of Smith vs. Lovejoy, 62 Ga., 373, Mr. Justice Jackson said:

"The juror's mind might have been influenced by the version given to the cause by the plaintiff, though he did not recognize the influence himself; therefore, although what he swore he might believe, yet impressions may have been made favorable to plaintiff and against defendant." Chief Justice Warner in delivering the opinion of this Court in the case of Daniel vs. the State, 56 Ga., 653, said: "The policy of the law is to protect jurors from all such influences and temptations in the trial of criminal cases, as well as defendants who may be injured thereby." So therefore, in determining whether the plaintiff in error has any cause or complaint on account of the demonstrations made in the court room during the trial, and subsequently both in the court room and court-house yard while the jury were considering the case, the inquiry is not to be confined to the effect that such demonstrations actually had on the minds of the jurors, but the question to be determined is whether the demonstrations referred to were of such a nature as that they were calculated prejudicially to affect the jurors trying the case. Tested by this rule, it is apparent that the defendant did not have a fair and impartial trial, which the law guarantees to him and to which he is entitled, be he guilty or innocent. The heinousness of the crime with which he was charged must not be and cannot be allowed to affect the manner of his trial; for only by a fair and legal trial can his guilt be so established as to make him

subject to the punishment which the law visits on offenders in such a case. Without any reference to the correctness or incorrectness of the verdict rendered in the case under the evidence which was submitted, we must, in deference to the obligations which we have assumed, as we understand them, reverse the judgment of the Court below, because the defendant's guilt has not been established by a fair and impartial trial in the manner contemplated by law."

Another case is that of Daniel vs. The State, 56 Ga., 654 in which a new trial was ordered because one of the jurors was allowed to separate from the jury. Chief Justice Warner says:

"Jurors are as liable in our day to be influenced and controlled by public opinion as Pilate was in his day when by the clamor of the multitude, he consented to deliver up our Saviour to be crucified."

SUBSTANCE OF AUTHORITIES AND THEIR APPLICATION.

The substance of the foregoing decisions is that if the action of the Court below did not meet the situation and the jury were calculated to be influenced, that a new trial should be granted. Especially in point is the Collier case.

None of the cases appeal as strongly for reversal as the case at bar. In none of them was the disorder continued as persistently as it was in this case. In none of them was the judge as mild and negative in his measures as in this case. Not in one case of disorder here did the judge below fine the offender; not in one instance did the judge stop the trial and make an effort to find the offender; not in one instance did he order anyone out of the court room. Simply a mild admonition was given that if the disorder was repeated that the judge would clear the court room. The audience grew used to this

statement and came to believe that the threat would not be enforced.

In this case there is no question but that complaint was made every time by the prisoner's counsel when the disorder occurred. Mistrials were asked for on two occasions. On every occasion the court's attention was called to it and Court action invoked.

DISORDER AND APPLAUSE OF CROWD IN STREET WHILE JURY WAS BEING POLLED DEMAND A NEW TRIAL.

It appears from the record that the situation was so threatening that the judge did not deem it wise to have the prisoner present when the verdict was rendered. The prisoner's counsel waived the prisoner's presence. It was agreed that neither the prisoner nor his counsel should be present when the verdict was received; but the counsel asked that the judge poll the jury.

Therefore when the verdict was received none was present but the judge and the Solicitor-General. It cannot be held that under these circumstances it was incumbent upon the defendant to make any motion. It was the duty of the judge to do everything to protect the prisoner's interests that could have been done by the prisoner or his counsel if present. It was the duty of the judge, if any unfair situation arose, to take such steps as would prevent a prejudicial result to the defendant.

When the judge first began to poll this jury, amid the cheers and shouts of the multitude assembled on Pryor and Hunter Streets, it was apparent that if any juror was disposed to deny the verdict upon being polled, that this demonstration would have overawed him into submission. The judge should have sent the jury back to the room, declining to receive their verdict and ordering

further deliberation, or he then and there should have declared a mistrial, after communicating with the prisoner's counsel and ascertaining from them whether they objected.

POLLING JURY PART OF PROCESS OF MAKING VERDICT.

Irrespective of all these directions, it is perfectly obvious that if polling the jury is a substantial right, it amounted to nothing in this case because of the demonstration which not only overawed the jury, but made it almost impossible for the court to hear their responses.

A verdict is not complete when it is read in court. It is only complete after the jury is polled. Every juror has an opportunity to dissent in open court from the verdict, upon being polled. The verdict is still *in fieri* before the jury is polled; nothing could be more important than the utmost freedom of action while this action is taking place.

The demonstrations of the crowd are just as effective, or probably more so in resulting in injury to the prisoner during the polling of the verdict as during the trial of the case in court.

A more critical time for the jury to be free from outside influences cannot be conceived of than while they are deliberating in their room and while they are being polled.

This jury while deliberating on one of the top floors of the building at the corner of Hunter and Pryor Streets, was doing so in the face of an excited crowd thronging Hunter and Pryor Streets just below them. A mere look out of the window would have disclosed the scowling faces of the mob.

Can it be said that a jury has any freedom of action under such circumstances? Were they not afraid for their very lives?

And when thus intimidated into a verdict, as they must have been, ought not some man who had a little more courage than the rest, be allowed to recant if he wished to do so while the polling was taking place? The nerve of some man may have returned to him while the judge was polling them and he could have then arrested the verdict.

The judge certifies, in reference to this ground, that while he was polling the jury, the disorder in the street and the applause at the rendition of this verdict was so great that he could with difficulty hear the answers of the jurors.

JURY HEARS DEMONSTRATION WHILE BEING POLLED AND KNEW WHAT IT MEANT.

Is it not child's play to say that the jury did not hear and understand this?

As Judge Little remarked in the Collier case hereinbefore stated:

"It cannot be doubted from the evidence that this demonstration was made against the accused and it is more than inferable that the purpose of the demonstration was to secure from the jury a verdict of conviction. It would be mere idle talk to say that the jurors did not understand that the demonstration was against the prisoner on trial."

AUTHORITIES ON POLLING JURY.

The jury, up to the time of being polled must remain just as free from influences as before they are polled. Anything which subjects a juror to improper influence

between the return of the verdict and his being polled will vitiate the verdict; and it has been held several times that if there is a waiver of the right to poll and the jury has been allowed to disperse, it is too late to re-assemble them for the purpose of polling, the clear reason being that the jury when polled should be fresh from the jury box and should not have been subjected to any influences whatsoever. See Russell's case, 68th Ga., 788; Barfield vs. Mullino, 107 Ga., 731; Smith vs. The State, 59th Ga., 514.

In criminal cases the defendant has the right to demand that the jury be polled Williams case, 63 Ga., 306; Tilton's case, 52 Ga., 479.

In Nolan's case, 55 Ga., 521, Judge Bleckley in delivering the opinion, states a most remarkable instance of polling a jury. To use his language, it is as follows:

"Many years ago in the county of Fayette I witnessed the polling of a jury on the return of a verdict of guilty, where the 11 jurors first called declared the verdict to be theirs and one, the 12th man, disowned it. The result was that on re-considering the case the whole 12 agreed to a verdict of not guilty and the prisoner was acquitted."

It is entirely possible that some one of these jurors might have denied the verdict to be his.

It will be borne in mind that until each juror upon being polled expresses his assent to the verdict, it did not become a verdict at all. The polling was as much a part of the process of making the verdict as the jury's deliberation which resulted in its being written down.

In 12th CYC, page 687, we have the following in the text: "If any juror does not agree in the verdict as written, he must express his dissent before it is recorded for it is not perfected until the jurors have expressed their assent, either in this method or by polling."

Georgia has long been classed among those states where in a criminal case the defendant has the right to demand that the jury be polled. See 12th CYC, 687, citing the case of Blankenship, 112 Ga., 402.

If the right is of value; if the polling of the jury can be demanded and if the judge undertakes to poll the jury, it follows that it must be done correctly, and under such circumstances as that the polling must be a free expression of the jury's opinion.

The consent here that the jury might return a verdict in the absence of the defendant and the defendant's counsel did not waive the polling, because that consent was coupled with the condition that the jury be polled, and the judge acquiesced in that condition and undertook to comply therewith. The point we make here is that in complying with it, the court committed an error in allowing the poll to proceed under circumstances which absolutely destroyed the jury's free agency.

IMPROPER ARGUMENT BY SOLICITOR; RULES OF LAW GOVERNING.

We come now to discuss a number of grounds which deal with improper argument by the Solicitor-General.

Before taking up each ground seriatim we desire to call attention to some text books and decisions laying down the limitations upon the right of argument and deciding under what conditions improper arguments will result in a new trial.

And in this connection we wish to say that not only does improper argument frequently result in a new trial but the asking of improper questions by the prosecuting attorney has frequently resulted in new trials.

In 12 CYC, 572 is the following statement in the text: "The District attorney should not be permitted to

ask a series of improper, incompetent and prejudicial questions which he knows or has reason to believe from their character, the Court will not permit to be answered.'' This citation from the text is supported by numerous authorities.

In laying down the general duty of the prosecuting attorney in his argument, it is stated in 12th CYC, 572, as follows:

''It is always the duty of the prosecuting attorney to treat the prisoner in a fair and impartial manner.''

The text states further that it is reversible error to allow the prosecuting attorney in his argument to declare his individual opinion not expressly stated to be on the evidence that the accused is guilty, the text stating as follows, 580 of the 12th CYC:

''It is reversible error for the prosecuting attorney in his argument to the jury to declare his individual opinion or belief not expressly stated to be on the evidence that the accused is guilty, or to state that defendant's counsel advised him to plead guilty.''

In reference to appeals to prejudice and passion and abusive language, the following is stated in the text of 12th CYC, page 581:

''The remarks of the Prosecuting Attorney which are injurious to the accused in that they prejudice the minds of the jurors against him generally or specifically, by referring to his wealth and social influence as contrasted with the poverty of the person injured, to an alleged improper influence over the administration of justice by one of his family, to the fact that a conviction of a lower crime will entail great expense on the county or by stating that he cares nothing for the expense entailed on the county by hanging the jury, are error.''

In 12th CYC, page 582, the following is laid down:

''Remarks of the prosecuting attorney to the jury, which, by appealing either to their fears or their vanity,

tend to coerce or cajole them into a verdict of conviction, are error."

As to the objections which should be made to improper argument, the following is laid down in 12th CYC, page 584:

"Objections to improper remarks of the prosecuting attorney in his closing argument to the jury should be promptly made as soon as the improper remarks are uttered."

In regard to the action which the court should take when attention is called to improper remarks, the following is the statement in the text of 12th CYC, page 585:

"Prompt action by the Court in reprimanding the prosecuting attorney for making improper comments or statements and an immediate verbal direction to the jury to disregard them is usually sufficient to cure the error and avoid a reversal; and this is particularly true where the prosecuting attorney promptly withdraws the remarks or explains away its effect. But whether comments upon the failure of the accused to testify are cured by the prosecuting attorney withdrawing his remarks or by the court instructing the jury to disregard them, the authorities are not harmonious. Many cases hold the affirmative, although the jury are positively instructed to dismiss the comments from their minds."

The Georgia rule is even more strict upon the Prosecuting attorney staying within reasonable bounds than the rules stated in the text of CYC.

In the case of Jesse, 20th Ga., 168, Judge McDonald, speaking for the court, says:

"It may not be amiss, however, to observe that while the safety of society requires the faithful prosecution of offenders against the laws, the State does not ask their conviction but upon a calm and dispassionate investigation of the charges against them."

In Augusta Ry. vs. Randall, 85th Ga., 297—it was held that the remarks of plaintiff's counsel in his address to

the jury, though unobjected to, tended to prejudice the minds of the jury against the defendant and required a ground of new trial. The case goes fully into the rights of counsel in addressing the jury and should be read in toto. Judge Simmons says in the course of opinion "that counsel is outside of his duty and his right when he appeals to prejudice irrelevant to the case; that prejudice has no more sanction at the bar than on the bench, and that counsel has neither right nor duty to appeal to prejudice against his adversary and dehors the very case he is to try."

In Berry vs. The State, 10th Ga., 511, it was held a new trial should be granted for improper argument of the Solicitor-General, even though same was unobjected to.

Judge Lumpkin says:

It is contended that it was the duty of the court to have stopped the counsel or to have disabused the minds of the jury by way of charge, from the improper impressions thus produced_____ That the practice complained of is highly reprehensible no one can doubt. It ought in every instance to be promptly repressed. For counsel to undertake by a side wind to get in as proof which is merely conjecture and thus to work a prejudice in the mind of the jury cannot be tolerated. Nor ought the presiding judge to wait until he is called on to interpose. For it is usually better to trust to the discrimination of the jury as to what is and what is not, in evidence, than for the opposing counsel to move in the matter. For what practitioner has not regretted his untoward interference when the counsel thus interrupted, resumes '*Yes, gentlemen, I have touched a tender spot, the galled jade will wince; you see where the shoe pinches.*' Is it, I ask, worthy of the noblest of professions thus to sport with the life, liberty and fortune of the citizens? A profession which is the greatest repository of the first talents in the country and to whose standard the most gifted habitually flock as offering the

highest inducements of reputation, wealth, influence, authority and power, which the community can bestow.

"I would be the last man living to seek to abridge freedom of speech, and no one witnesses with more unfeigned pride and pleasure than myself the effusions of forensic eloquence, daily exhibited in our courts of justice. For the display of intellectual power, our bar speeches are equalled by few, surpassed by none. Why then resort to such a subterfuge? Does not history, ancient and modern, nature, art, science and philosophy, the moral, political, financial, commercial and legal—all open to counsel their rich and inexhaustible treasures, for illustration?

"Here under the fullest inspiration of excited genius they may give vent to their glowing conception, in thoughts that breathe and words that burn. Nay more; giving reigns to their imagination, they may permit the spirit of their heated enthusiasm to swing and sweep beyond the flaming bounds of space and time, extra flammantia moenia mundi. But let nothing tempt them to pervert the testimony or surreptitiously array before the jury facts which, whether true or not, have not been proven.

In Ivey vs. The State, 113 Ga., 1062, the Solicitor-General used the following language:

"Gentlemen of the jury, I want you to stand by me and help break up this vile den. If you could go over this town and see the good mothers whose pillows have been wet with tears for their boys who have been intoxicated by the acts of this woman."

The lower Court declined to grant a mistrial. Chief Justice Simmons says:

"While the State is the accuser in every criminal case, it does not seek the conviction or punishment of any-one of its citizens unless the evidence shows beyond a reasonable doubt that he is guilty. An officer is appointed to represent the State in the courts and it is his duty when the evidence shows or tends to show the guilt of one on trial for crime, to argue to the jury that the evi-

dence is sufficient to authorize a conviction and that the jury should return a verdict of guilty. The State, however, will in no case permit its representative to go outside of the evidence to find a basis for appealing to the sentiments, passions or prejudices of the jury in order to obtain a conviction. Jesse vs. State, 20th Ga., 169. The Solicitor-General appointed to represent the interest of the State in the trial of offenders does not occupy the position of counsel generally. His duty does not require him to insist upon the conviction of the accused unless the evidence is sufficient to authorize it. His office is quasi judicial; and while it is his duty, if he honestly believes that the evidence shows the guilt of the accused to insist upon this view before the jury and to use in his argument all his ability and skill in presenting the case as made by the pleadings and the evidence, still it is under no circumstances his duty either to go outside of the case and state facts not in evidence or to appeal to the passions or the prejudices of the jury. The motion for new trial shows that the solicitor general stated as facts things to which no witness had testified; that good mothers had wet their pillows with tears over their boys who had been intoxicated by the acts of the accused. These remarks were not warranted by the evidence, and were plainly calculated to prejudice the accused. While, as before remarked, the State is the accuser in criminal cases, it will not permit its representative to use unfair means against the accused, pending the trial, or to comment upon facts not put in evidence or to make remarks calculated to prejudice the accused in the minds of the jurors.''

In Hunter vs. the State. 133 Ga., page 78, it was said that the Court has frequently held that a lawyer should not be permitted to make statement of facts concerning the issues on trial in the presence of a jury outside of the evidence and prejudicial to the adverse side. It is not only improper in a lawyer to indulge in it, but it is improper on the part of a judge to allow it to be done. If

an effort is thus made to get facts before the jury, not by legal evidence but by the bald statement of counsel, the presiding judge, should on having his attention directed to it promptly, stop it, rebuke counsel and exclude the matter from the attention of the jury in a clear and explicit manner. Even though without a motion, if the judge sees that improper methods are being used, he should interpose and stop them. Judge Lumpkin says:

"If facts material to the case and prejudicial to the adverse side are stated by an attorney in the presence of the jury, without evidence thereof, and under the circumstances, it seems improbable that the injury so affected can be cured by rebuke and instructions, a mistrial should be granted on motion. It is true that a mistrial may cause a loss of time and a repetition of some work; but if the minds of a jury have been so infected or prejudiced by improper statements of facts out side the evidence that it is not probable that the case can be fairly and impartially tried. the trial should not proceed to a verdict under such circumstances, over the objection of the injured party. Time is important but justice is more so. The State of Georgia, in administering the law through its courts, cannot afford to secure a verdict of conviction of murder against a defendant by unlawful methods. We are not curtailing the legitimate latitude of argument. We are referring to getting facts before a jury by unsworn statements instead of evidence."

In Moore vs. the State, 10th Ga., App. 805, it is held that a new trial will be granted because of the Solicitor-general's argument to the jury that in his opinion the defendant then on trial was guilty and because he argued that the failure of the defendant to put up a certain witness was due to his trying to flim-flam the jury. The Court held that this was improper argument which required a new trial. It appears in this case that on the day previous to the trial, the defendant asked for a continuance on account of the absence of a witness, Paulk,

by whom he expected to prove the bad character of the State's witness. On the next day the trial was had and Paulk was present, but he was not sworn by the defendant. It was by reason of this conduct that the Solicitor-General argued that the defendant was trying to flimflam the Court. The Court says in part:

"We conclude, therefore, that when the Court gave sanction to the argument that an inference of guilt could arise from the fact that the defendant had not introduced the witness for the purpose of impeaching the State's witness, as it had been stated he intended to do, and permitted the counsel for the State to continue the argument, the jury were presumably misled and influenced by this argument to the prejudice of the defendant. But for this error, we would unhesitatingly affirm the judgment, for there is no merit in the several exceptions to the charge of the Court."

Judge Russell states:

"The argument might have been proper to the Court in resisting the motion for continuance, but certainly the only effect of it before the jury would be to prejudice them against the defendant; for the question before the jury was not whether the defendant's motion for a continuance was meritorious, but whether the defendant was guilty of the offense charged in the indictment; and counsel's statement that the defendant had not put up the witness because he knew he was guilty seems to us to be objectionable for the same reason that counsel for the State is not permitted to state to the jury that the defendant has not made a statement or to argue, from the facts that the defendant has not made a statement that it may be inferred that he is guilty of the offense charged. The rule that the defendant's failure to make a statement cannot be commented upon has been rigidly adhered to ever since it was laid down in Bennett vs. the State, 86 Ga., 401 (12 S. E., 806; 12 LRA., 449; 22 Am. St. R., 465). If the law, in its care for the rights of defendants and in seeing that they are accorded a fair trial, deems it no proper evidence of guilt that the defendant (who

most frequently has it within his power to explain circumstances evidencing his guilt) makes no statement in his own behalf, it would seem that an inference of guilt, dependent only upon the fact that the defendant decided not to introduce a witness whom he had summoned, and whom he said he desired to use for the purpose of impeachment, would not rest upon a more substantial basis. If it is not permissible to argue that the defendant is probably guilty because he sits silently by and does not deny the truth of statements which he above all others must know to be false, when the jury can believe his statement in preference to sworn testimony, it would seem unreasonable that the law should permit the jury to presume that the defendant is guilty because he did not introduce a witness whom he had summoned for the purpose of impeaching a witness testifying against him. Incriminatory circumstantial evidence is faulty unless it produces such conviction as exclude any other reasonable supposition than the hypothesis claimed. It is just as reasonable to suppose that a defendants reason for not introducing a witness he has subpoenaed is that the witness does not know, or will not testify to the fact that the defendant wishes to establish, as to entertain any other supposition that can arise; but the fact that that witness does not know or will not testify to the particular fact does not disprove the existence of that fact. On the contrary, the fact may be well known to others, who may or may not be present and who may or may not testify."

Minor vs. the State, 120 Ga., 490, is a case in which the accused failed to make a statement. It is improper and calculated to injure the accused for the State's counsel to say to the jury in his argument:

"There sits the man accused of this dreadful crime, and don't even come on the stand to deny it, though his constitutional right allows him to make his statement and deny his guilt.

Bird vs. the State, 50 Ga., 585;
Robinson vs. State, 82 Ga., 535;
O'Dell vs. State, 120 Ga., 152.

Counsel for the accused having objected to the remark and moved for a mistrial, it was error to refuse the motion, unless the Court, by appropriate instructions, obviated any injurious effect to the accused from the remarks made. The withdrawal of the remarks by the State's counsel and the Court's admonishing him to confine himself to the evidence were not sufficient to remove the effect of the improper argument."

In Mitcham vs. State, 11 Ga., 622, in granting a new trial for improper argument on the part of the Solicitor-General, the Court said it was violative of the rights of the accused; that it violated the privileges granted by Magna Charta, and guaranteed by the law of the land, and that the accused is entitled to have a fair trial by a jury but such conduct on the part of the Solicitor-General, unprevented by the Court, prevented him from having such trial, and that a new trial would be granted for such reason.

In Farmer vs. the State, 91 Ga., 270, which was an indictment for murder, Chief Justice Bleckley states:

"The facts of the case touching improper remarks by counsel for the State in his argument to the jury are set forth in the official report. It will be noticed that the cause of complaint as embodied in the motion for a new trial is somewhat mitigated by the explanatory note of the presiding judge. But the impropriety was very great, and the Court should have unequivocally rebuked the counsel and instructed the jury to disregard entirely the improper remarks, even without any request to do so. The omission to deal thus with the matter is attributable alone, we think, to inadvertence. The failure of the counsel for the accused either to move to have a mistrial declared or to request any charge to the jury on the subject and thus to invoke a ruling by the Court, is all that prevents this from being a cause for a new trial. Gross impropriety in the argument of cases seems to be a widely

prevalent evil in conducting trial, both civil and criminal. It is one which ought speedily to disappear entirely, and for the good of justice and the honor of its administration by judicial tribunals, we hope it will."

In Cribb vs. the State, 118 Ga., 316, Judge Lamar states:

"Counsel cannot indirectly introduce evidence by reading statements of fact contained in published reports of this or any other court. If it appear that the reading is for the purpose of establishing facts which might influence the jury, it would be the duty of the judge, on objection, to prevent the same. Evidence which in one case produced a given result, can afford no guide to a jury on the trial of another. A verdict in one case is no standard of what should be done in what may be argued to be a similar case."

Johnson vs. the State, 88 Ga., 606, is a case much in point. It was held that it is not legitimate practice for Solicitor-General, in his argument for the admission of evidence offered by him in behalf of the State, such evidence being a specific fact bearing strongly against the accused, to announce in the hearing of the jury that he has several more witnesses by whom he can prove the same fact, and that he had reserved them, with the witness under examination, to be offered in rebuttal. The number of witnesses that the Solicitor-General had in reserve had no relevancy to the merits of the discussion, and any reference to the same might affect the jury prejudicially to the accused, the offered evidence being excluded by the Court as not rebutting evidence, and therefore offered too late.

No admission by a prisoner or his counsel results from their failure to examine the State's witnesses concerning a fact which the Court had ruled to be inadmissible, and for that reason excluded when offered by the State; and it is flagrant error to allow the Solicitor-General, over the

objection of prisoner's counsel, to argue to the jury that such failure is an admission. And the same principle applies to the argument that failure to introduce these witnesses as his own, after their exclusion as witnesses for the State, amounted to such an admission by the prisoner or his counsel. The fact thus sought to be established by argument alone being a material and possibly a controlling one in the case, the prisoner is entitled to a new trial.

Judge Lumpkin states:

"The prosecutor while on the stand, had testified that certain persons, naming them, had seen him in possession of a hundred dollar bill, this being under the issues presented, quite an important fact. After the defence was closed, the Solicitor-General offered to prove by one of those persons, named Warren, that he had seen the prosecutor with the hundred dollar bill. Counsel for the accused objected to this testimony as not being in rebuttal, and while the objection was being discussed, the Solicitor-General stated, in the hearing of the jury, that he had four or five witnesses, including the one then on the stand, by whom he could prove the fact in question, stating what it was, and had purposely reserved them to make this proof in rebuttal. Counsel for the accused objected to such a statement being made in the presence of the jury, and notwithstanding the Court ruled that the testimony referred to was not in rebuttal and was inadmissible, no further notice was then taken by the Court of the objection made to the Solicitor-General's statement, nor did the Court in its charge to the jury caution or warn them that this was not proper practice, or that the statement complained of should not affect their verdict in the case. The testimony which the Solicitor-General was endeavoring to introduce was, as already remarked, important, and it bore very strongly against the accused. It is immaterial to the present purpose whether the Court was right or wrong, in rejecting this testimony. No possible light on the question of its admissibility at the time when offered could come from a statement of the State's counsel

that he could prove the same thing by a number of other witnesses, but it is quite probable that this statement operated on the minds of the jury prejudicially to the accused. At any rate this was its tendency, and no one can tell to what extent it affected the verdict. This subject requires no further elaboration, but we take this occasion to repeat what this Court has already said, in effect many times: that on the trial of cases no fact should ever go to the jury except through the legally appointed channels. It is absolutely indispensable to the fair and proper administration of the law that this plain and just rule should be invariably observed.

"While counsel for the accused was making his argument to the jury, the Solicitor-General gave notice that he would argue in conclusion that the fact that such counsel did not ask the witness Warren and other witnesses, while on the stand, whether what the prosecutor had sworn to was the truth (to-wit: that these witnesses had seen him with the hundred dollar bill) was an admission that the prosecutor's statement was true. The Court was asked to prevent the Solicitor-General from making such an argument, but declined to do so. When the latter did make his argument, he took the position above indicated, and insisted upon it strenuously, counsel for the accused again objecting, and the Court refusing to interfere. He further argued that the fact that accused's counsel, after hearing the testimony of the prosecutor, that these witnesses had seen him with a hundred dollar bill, failed thereafter to introduce them as witnesses for the accused; to disprove this statement was a conclusive admission that the witnesses did see him with the bill. . . . We feel constrained to allow the accused another hearing. The conclusions drawn by our able, gifted and eloquent brother Wright from the premises stated were unauthorized, and were highly injurious to the accused. Let me sum up the matter in a nut shell: The Solicitor-General offered to prove a fact by one witness and stated that he could prove it by several others; the opposing counsel objected to the testimony and the Court sustained the objection; then, because this counsel declined to examine these wit-

nesses on the very matter which, at his instance, the Court had ruled was not then a proper matter for investigation, and because he refused to introduce these witnesses as his own and examine them about this matter, it is argued that he thus admits for his client the truth of the thing he had induced the Court to rule out. It would be dangerous, indeed, to object to testimony and succeed in having the objection sustained or to decline to introduce hostile witnesses, if either of these things resulted in establishing as against the party so objecting or declining, the truth of that which from his standpoint and in the opinion of the Court was inadmissable altogether."

In Washington vs. the State, 87th Ga., 12, Judge Lumpkin states:

"It is the well settled policy of this Court that counsel in the argument of cases should confine their remarks to the law and the evidence, and that in no instance should they be permitted to comment upon extraneous facts prejudicial to the interests or rights of a party, over his objection, unless such facts be of a kind of which judicial cognizance may be taken without proof. The wisdom of this rule is well established by numerous and respectable authorities. In Weeks on Attorneys, Section 112, it is said: 'Counsel must confine themselves to the facts in evidence. This is a rule frequently violated. It is the duty of a Court to check any departure from the evidence and to stop counsel when he introduces irrelevant matters or facts not supported by the evidence. If an objection be made to this course of argument, it is error for the Court to permit it, and a new trial may be granted for such error; but where counsel for the State made comments outside of the evidence and no objection was made, it was held not error. . . . A careful review of all the authorities above cited and referred to will lead to the conclusion that the rule above laid down should be carefully and strictly enforced by the Courts. In the case now under consideration the fact that frequent arsons had occurred in the community, if such was the fact, could

have no possible bearing upon the questions whether or not the defendant maliciously set fire to the guard house in Albany. The only effect that the making of such a statement by the Solicitor-General could have would be to improperly prejudice the minds of the jury against the defendant. Certainly the fact he undertook to state was not one of such public notoriety or matter of history as that the Court or the jury could take judicial cognizance thereof. It was the duty of the Court, when the objection was made by defendant's counsel to promptly and unequivocably declare that such an argument was improper and require the Solicitor-General to desist therefrom. Instead of so doing, the Court undertook to inform the jury what it presumed the Solicitor-General meant thereby, and this we do not think was the proper course to pursue. We repeat here that this Court will hereafter strictly adhere to and enforce the rule upon this subject, which has been stated above."

In Thomas vs. the State, 129 Ga., 219, Judge Evans says:

"The law points out the course to be pursued when foreign matter is injected into the case by means of argument. Civil Code Section 4419. The Court should interpose without request and by proper instruction, seek to remove any prejudicial effect the remark may likely produce. If the transgression is of such a character as to impugn the fairness of the trial, a mistrial may be declared. At the same time it is the duty of counsel to bring to the attention of the Court any remark of adverse counsel which he thinks is improper and hurtful to his client's case and invoke the ruling of the Court."

Section 4957 of the Code of Georgia provides "Where counsel in the hearing of the jury make statements of prejudicial matters which are not in evidence, it is the duty of the Court to interpose and prevent the same; and on objection made, he shall also rebuke the same, and by all needful and proper instructions to the jury endeavor to remove the improper impression from their minds; or, in his discretion, he may order a mistrial if the plaintiff's attorney is the offender."

STATE'S ATTORNEYS ARGUE DEFENDANT'S FAILURE TO CROSS EXAMINE STATE'S WOMEN CHARACTER WITNESSES IS EVIDENCE OF FRANK'S BAD CHARACTER—THAT IF FRANK HAD GOOD CHARACTER, HIS COUNSEL WOULD HAVE ASKED WOMEN ON CROSS EXAMINATION HOW THEY GOT THEIR INFORMATION BUT DARED NOT DO IT, AND THAT THIS FAILURE WAS EVIDENCE OF SPECIFIC INCIDENTS OF IMMORALITY ON FRANK'S PART.

(Ground 69, Page 95, Motion for New Trial.)

This ground complains that the Court erred in permitting Mr. Hooper, for the State, to argue to the jury that the failure of the defense to cross examine the State's female witnesses, who testified as to the bad character of Frank for lasciviousness, was strong evidence of the fact that if the defendant had cross examined them they would have testified to specific incidents of immorality on the part of Frank; that the defendant's knowledge that they would bring out such incidents was the reason for not cross examining the witnesses; and that the jury could, therefore, reasonably know that Frank had been guilty of specific incidents of immorality other than those brought out in the record.

The defendant strenuously objected to this line of argument on the part of Mr. Hooper, and urged the Court to state to the jury that the failure to cross examine any of the State's witnesses justified no such inference on the part of the jury that a cross examination, if had, would have brought out anything hurtful to the general character of Frank.

This the Court declined to do, and permitted the argument.

This argument of Mr. Hooper was followed up by the Solicitor-General, in his concluding argument, with an argument about in substance as follows:

That the conduct of the defendant's counsel in not cross examining the State's female witnesses against the defendant's character, refuted any claim that Frank had a good character; that if he had a good character, no power on earth would have kept counsel from asking these women where they got their inferences, and why it was they stated that Frank had a bad character; that Frank's counsel had a right to go into that character, and on cross examination dared not do it; that whenever anybody had evidence in their possession, and failed to produce it, the presumption arose that it was hurtful; and that the reason Frank's counsel never cross examined these women was that they dared not do it.

In response to the last argument, just quoted, by the Solicitor-General, the Court certifies that while the defendant made no objection to this argument at the time, it was for the reason that similar arguments made by Mr. Hooper had been objected to by counsel, and that their objection had been overruled, and the Court had stated, at the outset of the case, that objections once noted in the Record need not, in similar instances, be repeated, and that the Court would assume that similar objections had been made and overruled.

That the error of the Court, in permitting the foregoing argument of Mr. Hooper and Mr. Dorsey, demands a new trial, there can be little doubt. The State had no right to go into any specific instances these women might swear to against Frank. The right on the defendant's part to rule out specific instances, would avail him little if the State's counsel could argue to the jury that the failure to cross examine as to specific instances meant that

the defendant knew the specific instances could and would be proved.

The defendant has an absolute right to stand on a failure to cross examine as against a claim of this sort. Counsel for the State have no right, in an indirect way by argument, to get in something which they could not get indirectly from witnesses.

It is not to be doubted that it would have been inadmissible for these various women, put up by the State against Frank's character, to give specific instances of immorality. Frank was on trial solely upon the charge of murder, and it was unfair to require him to make answer to charges from women he had perhaps never heard of, at places he had no notice of. This would be to lay an ambuscade for him, that no matter how innocent he might be, he could not answer.

In Johnson's case, 88 Georgia, page 606, it was held that it was no admission by a prisoner to fail to examine State's witnesses concerning a fact which the Court had ruled to be inadmissible, and which was for that reason excluded when offered by the State; and that it was flagrant error to allow the Solicitor-General, over objection of defendant's counsel, to argue to the jury that such failure is an admission. And the same principle applies to the argument that failure to introduce these witnesses as his own, after their exclusion as witnesses for the State, amounted to such an admission by the prisoner or his counsel. The fact thus sought to be established by argument alone being a material, and possibly a controlling one in the case, the prisoner was entitled to a new trial.

In a criminal case the State has no right even to comment upon the defendant's failure to make a statement.

See Robinson's case, 82 Georgia, page 535, and Byrd's case, 50 Georgia, page 585.

The argument of the State's attorneys in this case amounted to telling the jury what these witnesses would have sworn to if cross examined by the defendant. It was the equivalent of a statement (which was not proved) that each of these witnesses had sworn to an act of immorality; and counsel for the State met the objection made to such argument by saying that if the defendant had dared to cross examine them they would have shown specific acts of immorality.

In the case of McGahan, 48 West Va., 438 (same case, 37 S. E., 573), the State's attorney, in his concluding argument, told the jury as follows:

"You see how reluctant my witnesses were to testify. They would not tell half they knew. I could not ask them any questions to answer which would criminate them, but if they were innocent, they should have gone to defendant's counsel and compelled them to put them on the stand."

In commenting on this argument the Supreme Court of West Virginia say:

"Ordinarily such a line of argument is very improper, and should not be indulged in by counsel or permitted by the Court. The jury had the witness before them, and were able to judge for themselves pretty well whether they were telling all they knew, or whether they were withholding a part of the truth; but it is not proper for the prosecutor to tell the jury what the witnesses, in his opinion, knew about the case which they did not tell, or that they knew facts that would convict, if they would tell them. Conviction must be, if at all, on the evidence given, not on what might have been given."

The comments of the State's attorneys in this case were much worse than allowing the State to comment on the defendant's failure to introduce evidence of good

character, in the event defendant had failed to introduce such evidence.

The State's attorneys were claiming, in effect, that if, with these State's witnesses the defendant had a good character, he would have cross examined them, and that his failure to cross examine them was evidence that these witnesses would have given him a bad character, and that specific instances would have been cited.

That the defendant's failure to go into his character cannot be commented on by State's counsel, is held in Thompson's case, 92 Georgia, 448; Bennett's case, 86 Georgia, 401.

SOLICITOR ARGUES THAT DEFENDANT'S WIFE'S FAILURE TO VISIT HIM SHOWED SHE HAD CONSCIOUSNESS OF FRANK'S GUILT.

(Ground 71, Page 96, Motion for New Trial.)

In Ground 71 it is complained that the Solicitor-General told the jury:

"Do you tell me that there lives a true wife, conscious of her husband's innocence, that would not have gone through snapshotters, reporters, and everything else to have seen him? Frank said that his wife never went there, because she was afraid that the snapshotters would get her picture, because she didn't want to go through the line of snapshotters. I tell you, gentlemen of the jury, that there never lived a woman conscious of the rectitude and innocence of her husband, who would not have gone through snapshotters, reporters, and the advice of any Rabbi under the sun, and you know it."

This argument was strenuously objected to by defendant, but the Court declined to stop the argument, and permitted it to continue.

The Court had previously allowed evidence to be admitted showing that the defendant's wife had failed to go and see him at the police station.

The defendant's counsel, in objecting, used the following language:

"Mr. Arnold: I must object to as unfair and outrageous an argument as that; that his wife didn't go there through any consciousness of guilt on his part. I have sat here and heard the unfairest argument I have ever heard, and I can't object to it; but I do object to his making any allusion to the failure of the wife to go and see him; it's unfair, it isn't the way to treat a man on trial for his life."

The Court then said: "Is there any evidence to that effect?"

The Solicitor then said: "Here is the statement I have read." (The State having been allowed over defendant's objection to prove that defendant's wife did not visit him at the station house for some days after his incarceration, and defendant, in his statement, explained the reasons why she did not visit him.)

The defendant's counsel then said: "I object to his drawing any conclusions from his wife going or not going, it's an outrage upon law and decency and fairness."

The Court then said: "Whatever was in the evidence or the statement I must allow it."

The Solicitor then resumed before the jury and said: "Let the galled jade wince."

The defendant's counsel then replied: "I object to that. I am not a galled jade, and I've got a right to object. I am not galled at all, and that statement is entirely uncalled for."

The Court replied: "He has got the right to interrupt you."

The Solicitor then replied: "You've had your speech."

After a little more colloquy the Court made no ruling at all, and the Solicitor continued his argument, to the effect that the defendant's wife never visited him, in substance, in the language which we have hereinbefore set forth.

Even if evidence had crept in, in some way, without objection, that defendant's wife failed to visit him in the station house, this would not have justified the inferences drawn by the Solicitor-General from it, and the error is made graver when it is considered that this evidence came in over defendant's objection.

The defendant's wife would have had no right to testify as to what she believed of the defendant's guilt or innocence, even if under the law she could testify at all. Her consciousness, one way or the other, as to the defendant's guilt, was wholly inadmissible and immaterial. In the first place she could not testify. In the second place if she could have testified. the law would not for a moment have allowed her to express any opinion about the defendant's guilt or innocence, or state what her consciousness was.

And yet, the Solicitor-General puts the defendant's wife in the attitude of testifying before the jury that the defendant is guilty, by arguing, in effect, that the failure of the defendant's wife to visit him at the station house indicated that the wife was conscious of the defendant's guilt.

The argument was not warranted by the evidence or by the law, and this point is fully covered by the authorities hereinbefore quoted as an argument for which a new trial should be granted.

The language of the Solicitor-General, in response to the defendant's objection. "Let the galled jade wince,"—has been repeatedly held to be an improper reply to an objection, as see the authorities hereinbefore quoted, and especially the remarks of the elder Judge Lumpkin, reported in 10th Georgia, page 511.

This remark was not original with the Solicitor-General below, but has been used time out of mind by counsel,

and originated in the neighborhood of three hundred years ago from the pen of Shakespeare. It is unfair so to treat an interruption, and adds to the injury caused by the illegal argument, when the interruption is well founded.

SOLICITOR ARGUES THAT PHYSICIANS CALLED BY DEFENSE WERE CALLED BECAUSE THEY WERE THE FAMILY PHYSICIANS OF SOME OF THE JURORS.

(Ground 101, page 119, mtoion for new trial.)

In Ground 101 of the motion, it appears that the Solicitor argued as follows:

"It would not surprise me if these able, astute, gentlemen, vigilant as they have shown themselves to be, did not go out and get some doctors who have been the family physicians, who are well known to some of the members of this jury, for the effect it might have upon you; and I am going to show that there must have been something besides the training of these men, and I am going to trace them with our doctors. I can't see any other reason in God's world for getting out and getting these practitioners, who have never had any special training on stomach analysis, and who have not had any training on the analysis of tissues—like a pathologist has had, except upon that theory."

This argument was strenuously objected to by defendant's counsel, but the Court overruled the objection.

The objection was stated as follows by defendant's counsel:

"There is not a word of evidence as to that, that's a grossly improper argument, and I move that it be withdrawn from the jury."

The Solicitor General: "I don't state it as a fact, but I am suggesting it."

Defendant's counsel: "He has got no right to deduce or suggest it. I just want Your Honor to reprove it,—reprimand him and withdraw it from the jury; I just make the motion, and Your Honor can do as you please."

The Solicitor-General then proceeded to state that there must have been something besides the training of these men.

Defendant's counsel then stated: "I move to exclude that as grossly improper. He says he is arguing that some physician was brought here because he was the physician of some member of the jury; it's grossly unfair and it's grossly improper and insulting even, to the jury."

The Solicitor-General: "I say it's eminently proper and absolutely a legitimate argument."

Defendant's counsel: "I just record my objection, and if Your Honor let's it stay in, you can do it."

The Solicitor: "Yes sir; that wouldn't scare me, Your Honor."

The Court: "Well, I want to try it right, and I suppose you do. Is there anything to authorize that inference to be drawn."

The Solicitor-General: "Why, sure—why the fact that you went out and got general practitioners, that know nothing about the analysis of the stomach, know nothing of pathology."

The Court: "Go on then."

The Solicitor-General: "I thought so."

Defendant's counsel: "Does Your Honor hold that is proper, 'I thought so?' "

The Court: "I hold that he can draw any inference legitimately from the testimony and argue it—I don't know whether there is anything or not to indicate that any of these physicians was the physicians of the family."

The Court then proceeded to allow the Solicitor-General to make this argument.

The Record may be searched from end to end, and there is not a line of evidence in it to indicate that any of the physicians introduced by the defendant had ever

seen a member of the jury, much less that he was the family physician of any juror.

It is difficult to conceive of an argument more unfounded and more unwarranted and more unjust than this. It put the defendant, without a word of evidence to sustain it, in the attitude of putting up physicians who were physicians for some of the jury and thereby attempting to unduly influence them. It tended to prejudice the members of the jury against the defendant. The Solicitor's statement that he was justified in making this argument, because none of the defendant's physicians were stomach specialists, is no ground for this argument at all.

That they were not stomach specialists may have weakened their testimony as experts, but it did not warrant any specific inference that any of these physicians treated members of the jury, and that they were put up for that motive.

Moreover, several of the physicians put up by the defendant were experts on the stomach, notably Dr. Bachman.

THE SOLICITOR STATES FACTS OF DURANT CASE. STATES HE IS INFORMED THAT NOBODY HAS EVER CONFESSED TO THE MURDER OF THE WOMEN DURANT WAS CHARGED WITH KILLING.

(Ground 92, page 108, motion for new trial.)

Ground 92 of the motion complains that the Solicitor alluded to the Durant case from California; that he stated it was a celebrated case; that it was said to be the greatest crime of the century; that he didn't know where Mr. Arnold, one of defendant's counsel got his authority for the statement that he, Mr. Arnold, made in reference to

that case, and inquired, "I would like to know it;" whereupon Mr. Arnold said: "I got it out of the public prints at the time, Mr. Dorsey, published all over the country; I read it in the newspapers—that's where I got it." A colloquy then occurred between the counsel in which the Solicitor started to read a communication he had received on April 15, 1913, from C. M. Pickett, District Attorney of the City of San Francisco; but upon objection, the Court would not allow Mr. Dorsey to read this communication. However, he told Mr. Dorsey that he could state his information about the Durant case, and Mr. Dorsey then proceeded:

"My information is that nobody has ever confessed the murder of Blanche Lamont and Minnie Williams. But, Gentlemen of the jury, as I'll show you by reading this book, it was proved at the trial and there can be no question upon the fact, Theodore Durant was guilty, the body of one of these girls having been found in the belfry of the church in question; and the other in the basement. Here's the book containing an account of that case, reported in 48 Pacific Reporter, and this showed, gentlemen of the jury, that the body of that girl, stripped stark naked, was found in the belfry of Emanuel church, in San Francisco, after she had been missing for 2 weeks. It shows that Durant was a medical student of high standing and a prominent member of the church, with superb character, a better character than is shown by this man, Leo M. Frank, because not a soul came in to say that he didn't enjoy the confidence and respect of every member of that large congregation; and all the medical students with whom he associated. Another thing, this book shows that the crime was committed in 1895 and this man Durant never mounted the gallows until 1898 and the facts are that his mother took the remains of her son and cremated them because she didn't want them to fall into the hands of the medical students, as they would have done in the State of California, had she not made the demand and received the body. Hence that's all poppy-cock

he was telling you about. There never was a guiltier man, there never was a man of higher character, there never was a more courageous jury or better satisfied community, than Theodore Durant, the jury that tried him, and the people of San Francisco where he lived and committed his crime and died.''

That it is error to allow the counsel to discuss in such a manner as was done here the facts of another case, there can be no doubt.

THE COURT ERRED IN NOT TELLING THE JURY THAT FACTS OF OTHER CASES SHOULD HAVE NO INFLUENCE UPON THEM.

(Grounds 93-94, page 110, motion for new trial.)

Ground 93 complains that in as much as the Solicitor-General had discussed the facts of various cases that it was error on the part of the court not to charge the jury that the facts in other cases, read or stated in their hear ing were to have no influence upon them in making their verdict; that they were to try this case upon its own facts and upon the opinion they entertained upon the facts here introduced.

The law as stated in the Patten case, 117 Ga. 230, is that the judge should on his own initiative take action to correct improper argument and improper demonstrations. Here is a case where the Solicitor, as we claim, in flagrant violation of the law, brought in elaborately the facts of other cases. It is well known that the jury has to try the case in hand only upon its own facts. It is well known that nothing is more misleading than to undertake to state the facts of parallel cases in which other juries have found verdicts. The local environment, the difference in meaning of the facts and circumstances in one place as distinguished from another place are so material that it only confuses and misleads to allow the facts in

other cases to be brought before a jury. We think such a charge as is here claimed in this ground of the motion was demanded.

Ground 94 sets forth substantially the same contention as to failure to charge as ground 93.

THE SOLICITOR ARGUES ELABORATELY THE FACTS IN VARIOUS OTHER CASES, INCLUDING THE OSCAR WILDE CASE AND THE ABE RUEF CASE, THE McCUE CASE, THE RICHESON CASE, THE HENRY CLAY BEATTIE CASE AND THE CRIPPEN CASE.

(Ground 95, page 111, motion for new trial.)

The argument of the Solicitor is elaborately set forth in ground 95 of the motion, the Solicitor's language being as follows:

"Oscar Wilde, an Irish Knight, a literary man, brilliant, the author of works that will go down the ages—Lady Windmere's Fan, De Profundis, which he wrote while confined in jail; a man who had the effrontery and the boldness, when the Marquis of Queensbury saw that there was something wrong between this intellectual giant and his son, sought to break up their companionship; he sued the Marquis for damages which brought retaliation on the part of the Marquis for criminal practices on the part of Wilde, this intellectual giant; and wherever the English language is read, the effrontery, the boldness, the coolness of this man, Oscar Wilde, as he stood the cross examination of the ablest lawyers in England, an effrontery that is characteristic of the man of his type—that examination will remain the subject matter of study for lawyers and for people who are interested in the type of pervert like this man. Not even Oscar Wilde's wife,—for he was a married man and had 2 children—suspected that he was guilty of such immoral practices, and, as I say, it never would have been brought to light probably, because committed in secret, had not this man

had the effrontery and the boldness and the impudence himself to start the proceeding which culminated in sending him to prison for three long years. He's the man who led the aesthetic movement; he was a scholar, a literary man, cool, calm, cultured, and as I say, his cross examination is a thing to be read with admiration by all lawyers; but he was convicted and in his old age went tottering to his grave, a confessed pervert. Good character? Why he came to America after having launched what is known as the "aesthetic movement" in England and throughout this country lectured to large audiences and it is he who raised the sunflower from a weed to the dignity of a flower. Handsome, not lacking in physical or moral courage, and yet a pervert, but a man of previous good character. Abe Ruef of San Francisco, a man of his race and religion, was the boss of the town, respected and honored, but he corrupted Schmidt, and he corrupted everything that he put his hands on and just as a life of immorality, a life of sin, a life in which he fooled the good people when debauching the poor girls with whom he came in contact has brought this man before the jury, so did eventually Abe Ruef's career terminate in the penitentiary. I have already referred to Durant. Good character isn't worth a cent when you have got the case before you. And crime don't go only with the ignorant and poor. The ignorant like Jim Conley, as an illustration, commit the small crime, and he doesn't know anything about some of this higher type of crimes, but a man of high intellect and wonderful endowments, which, if directed in the right line, bring honor and glory, if those same faculties and talents are perverted and not controlled—as was the case with this man—they will carry him down. Look at McCue, the mayor of Charlottsville; a man of such reputation that the people elevated him to the head of that municipality; but notwithstanding that good reputation he didn't have rock bed character, and becoming tired of his wife, he shot her in the bath tub, and the jury of gallent and courageous Virginia gentlemen, notwithstanding his good character sent him to a felon's grave. Richeson of Boston was a preacher, who enjoyed the confidence of

his flock. He was engaged to one of the wealthiest and most fascinating women in Boston, but an entanglement with a poor little girl of whom he wished to rid himself, caused this man Richeson to so far forget his character and reputation and his career as to put her to death; And all these are cases of circumstantial evidence. And after conviction, after he had fought, he at last admitted it in the hope that the Governor would at last save his life, but he didn't do it and the Massachusetts jury and the Massachusetts Governor were courageous enough to let that man who had taken that poor girl's life to save his reputation as the pastor of his flock go, and it is an illustration that will encourage and stimulate every right thinking man to do his duty. Then there's Beattie, Henry Clay Beattie, of Richmond, of splendid family, a wealthy family, proved good character, though he didn't possess it, took his wife, the mother of a 12 months' old baby, out automobiling and shot her; yet that man, looking at the blood in his automobile, joked! joked! joked! He was cool and calm but he joked too much, and although the detectives were abused and maligned, and slush funds to save him from the gallows were used in his defense, a courageous jury, an honest jury, a Virginia jury, measured up to the requirements of the hour, and sent him to his death; thus putting old Virginia and her citizenship on a high plane. And he never did confess but left a note to be read after he was dead saying that he was guilty. Crippen of England, a doctor, a man of high standing, recognized ability and good reputation, killed his wife because of infatuation for another woman and put her remains away where he thought as this man thought, that it would never be discovered; but murder will out and he was discovered and he was tried, and be it said to the glory of old England, he was executed."

Ought not the Court to have severely rebuked the Solicitor for this illegal and highly prejudicial argument so as to leave no doubt in the minds of the jury that the law does not permit such reprehensible conduct on the part of counsel, especially in criminal case?

Can it be doubted that in view of the fact that the court allowed the foregoing argument,—the very least that could have been done was to instruct the jury that the facts of other cases should not be considered?

SOLICITOR MIS-STATES EVIDENCE AS TO QUINN BEING PLACED IN FACTORY BY EMMA FREEMAN AND CORINTHIA HALL.

(Ground 96, page 112, Motion for New Trial).

Ground 96 complains that in a very material part of the testimony the solicitor mis-stated it; that the record shows he mis-stated, and the court should have corrected the mistake.

Quinn is one of the most important alibi witnesses for the defendant, he swearing that he saw the defendant between 12:20 and 12:22.

The solicitor in refuting the testimony of Quinn, argued that his testimony "conflicts with the evidence of Miss Freeman and the other young lady who placed Quinn, by their evidence, in the factory before this time," (meaning before 12:20 to 12:22). Defendant's counsel objected upon the ground that there was not a word of evidence to that effect; that the two women were in the factory from 11:35 to 11:45 and never claimed to have seen Quinn there.

Mr. Dorsey repeated his charge upon the objection of defendant's counsel, and defendant's counsel then said "That's absolutely incorrect; they never saw Quinn there and never swore they did." The solicitor then resumed before the jury—the court having taken no action: "No, they didn't see him there; I doubt if anybody else saw him there either."

Defendant's counsel then objected to the crowd laughing at this reply of the solicitor, defendant's counsel saying: Mr. Arnold: "If the crowd of people here laugh every time we say anything, how are we to hear the court. He has made a whole lot of little mis-statements, but I will let

them pass; but I am going to interrupt him on every substantial one he makes."

After further colloquy, defendant's counsel found the evidence of the witness Corinthia Hall, and read it as follows:

"I read from the evidence of Miss Corinthia Hall. Then Mr. Dorsey asked her 'Then you say you saw Lemmie Quinn right at the Greek Cafe at 5 minutes to 12—something like that? A. No sir, I don't remember what time it was when I saw him; we went into the cafe, ordered sandwiches and a cup of coffee, drank the coffee and when we were waiting on the change, he came in.' And further on "All he said (Quinn) was that he had been up and had seen Mr. Frank; that was all he said? A. Yes sir'; and so on. Now the evidence of Quinn: 'What sort of clock was that? he's telling the time he was at DeFoor's pool parlor—what sort of clock was that? A. A Western Union clock. Q. What did the clock say when you looked at it? A. 12:30. And he also swore that he got back to the pencil factory at 12:20, and that's in a half dozen different places." The court then said: "Anything contrary to that record, Mr. Dorsey? "Mr. Dorsey: Yes, sir, I'm going to show it by their own table that didn't occur; that don't scare anybody and don't change the facts."

Mr. Dorsey never showed anything contrary to the evidence as read by counsel for defendant, and the record will bear the statement out that Corinthia Hall and Emma Freeman never claimed in the remotest way to have seen Quinn at the factory when they were there on Saturday. They only claimed to have seen him at the Greek Cafe and never claimed to have seen him at the factory at all. The damaging part of Mr. Dorsey's mis-statement was that these women claimed to have seen Quinn at the factory when they were there, from 11:35 to 11:45. Quinn had sworn he was at the factory and saw Frank at 12:20; the Solicitor claimed he was wrong about the time and he was only there when the women say him, some time before 12.

The Court took no action on this matter whatever and

did not restrain the Solicitor and permitted him to proceed, and did not state to the jury that there was no such evidence as the Solicitor argued.

The Court should have assumed the responsibility of deciding the issue between the counsel; it was error in the Court to allow the Solicitor who had the advantage of making the closing argument, to inject this mis-statement into the case.

THE SOLICITOR ARGUES THAT THE FAILURE OF FRANK TO CONFRONT CONLEY AT THE JAIL AFTER CONLEY'S CHARGE AGAINST FRANK IS EVIDENCE OF FRANK'S GUILT.

(Ground 98, page 114, motion for ne wtrial).

Ground 98 of the motion complains that the Solicitor was allowed to argue over objection as follows:

If there be a negro who accuses me of a crime of which I am innocent, I tell you, and you know it's true, I'm going to confront him, even before any attorney, no matter who he is, returns from Tallullah Falls, and if not then, I tell you just as soon as that attorney does return, I am going to see that that negro is brought into my presence and permitted to set forth his accusations. You make much here of the fact that you didn't know what this man Conley was going to say when he got on the stand. You could have known it but you dared not do it."

Whereupon Mr. Rosser made the following objection, Mr. Rosser: "May it please the Court, that's an untrue statement; at that time when he proposed to go through that dirty farce, with a dirty negro, with a crowd of policemen, confronting this man, he made his first statement—his last statement, he said; and these addendas—nobody ever dreamed of them and Frank had no chance to meet them; that's the truth. You ought to tell the truth if a man is involved for his life; that's the truth."

Mr. Dorsey then replied "It don't make any difference about your addendas; you may get up there just as much

as you want to, but I'm going to put it right up to this jury."

Mr. Rosser: "May it please the Court, have I got the right to interrupt him when he mis-states the facts?"

The Court: "Whenever he goes outside of the record."

Mr. Rosser: "Has he got the right to comment that I haven't exercised my reasonable rights?"

The Court: "No sir; not if he has done that."

Mr. Rosser: "Nobody has got a right to comment on the fact that I have made a reasonable objection."

Mr. Dorsey: "But I'm inside of the record; and you know it, and the jury knows it. I said 'May it please your Honor, that this man Frank declined to be confronted, by this man Conley."

Mr. Rosser: "That isn't what I objected to; he said that at that meeting that was proposed by Conley, as he says, but really proposed by the detectives when I was out of the city that if they had been met, I would have known Conley's statement; and that's not true; I would not have been any wiser about his statement than I was here the other day."

The Court: "You can comment upon the fact that he refused to meet Frank or Frank refused to meet him, and at the same time he did it, he was out of the city."

Mr. Arnold: "We did object to that evidence, Your Honor, but Your Honor let that in."

The Court: I know; go on."

Mr. Dorsey (resuming): "They see the force of it."

Mr. Rosser: "Is that a fair comment, Your Honor, if I make a reasonable objection, to say that we see the force of it?"

The Court: "I don't think that, in reply to your objection, is a fair statement."

Mr. Dorsey (resuming): "Now it may please your Honor, if they don't see the force of it, you do."

Mr. Rosser: "I want to know, is Your Honor's ruling to be absolutely disregarded like that?"

The Court: "Mr. Dorsey, stay inside of the record and quit commenting on what they say and do.

Mr. Dorsey: "I am inside of the record and Your Honor knows that's an entirely proper comment."

Mr. Rosser: "Your Honor rules—he says one thing and then says Your Honor knows better."

Mr. Dorsey: "Your Honor knows I have got a right to comment on the conduct of this defendant."

The Court: "Of course, you have; but when they get up and object I don't think you have any right to comment on their objections as they are making them to the Court."

Mr. Dorsey: "I don't."

The Court: "No, I don't think so."

Mr. Dorsey: "Isn't everything that occurs in the presence of the court the subject matter for comment?"

The Court: "No, I don't think you can comment on these things. You can comment on any conduct within the province of this trial but if he makes any objection that's sustained, why then you can't comment on that."

Mr. Dorsey: "Does Your Honor say I'm outside of the record?"

The Court: "No, I don't; but I say this; you can comment on the fact that Frank refused to meet this man, if that's in the record; you have the right to do that."

Mr. Dorsey, (resuming): "This man Frank, with Anglo Saxon blood in his veins, a graduate of Cornell, the superintendent of the pencil factory—so anxious to ferret out this murder that he phoned Schiff 3 times on Monday April 28th, to employ the Pinkerton Detective Agency, this man of Anglo Saxon blood and intelligence, refused to meet this ignorant negro, Jim Conley. He refused upon the flimsy pretext that his counsel was out of town, but when his counsel returned, when he had the opportunity to know at least something of the accusations that Conley brought against this man, he dared not let him meet him."

What right had the Court to allow the Solicitor-General to comment on Frank's not meeting Conley? Didn't Frank have the right to talk with whom he pleased in jail? Is not silence a God given right?

If the Solicitor General cannot comment on the defendant's failure to make a statement in court, can he comment on his failure to meet a negro, backed up by a number of detectives who are attempting to make a scene to his injury?

It is unnecessary to say that these facts as to Frank's refusing to meet Conley were in evidence. The state did prove them but proved them over defendant's strenuous objection. Defendant objected on the ground that just such unfair argument as the Solicitor did make would likely be made upon such evidence.

Such an incident had no legitimate connection with the case. It threw no light on who killed Mary Phagan. It was not an incriminating circumstance against Frank; it was not a confession, nor in the nature of a confession. It was his simple failure to meet and talk to a person he had a perfect right to refuse to see. Can such attempts to have scenes as this be made for the express purpose of being used in evidence and then used?

THE SOLICITOR CLAIMS FRANK REFUSED TO LOOK AT THE FACE OF CORPSE IN BLOOMFIELD'S ESTABLISHMENT. CLAIMS ROGERS SAID FRANK DID NOT LOOK AT THE CORPSE AND CLAIMS LIKEWISE BLACK SAYS FRANK DID NOT LOOK AT THE CORPSE.

(Ground 99, page 116, motion for new trial).

The facts in relation to this ground are as follows: The Solicitor-General, in his concluding argument, referring to the vist of the defendant to Bloomfield's undertakng establishment, on April 27, make the following remarks to the jury:

"Frank says that he visited the morgue not only once but twice. If he went down there and visited that morgue and saw that child and identified her body, and it tore him all to pieces, as he tells you it did, let any honest man—I don't care who he be—on this jury, seek to fathom the

mystery of this one thing; tell me why it was, except for the answer I give you, he went down there to view that body again. Rogers says he didn't look at it; Black says he didn't see him look at it."

Whereupon the following occurred:

Mr. Rosser: "He is mis-stating the evidence; Rogers never said he didn't look at the body; he says he was behind him and didn't know whether he did or not. And Black says he didn't know whether he did or not."

Mr. Dorsey: "Rogers said he never did look at that body."

Mr. Arnold: "I insist that isn't the evidence. Rogers said he didn't know and couldn't answer whether he saw it or not and Black said the same thing."

Mr. Dorsey (resuming): "I'm not going to quibble with you. The truth is, and you know it, that when that man Frank went down there to look at that body of that poor girl, to identify her, that he never went in that room and if he did look at her long enough to identify her, neither John Black nor Rogers nor Gheesling knew it. I tell you, gentlemen of the jury that the truth of this thing is that Frank never look at the body of that poor girl, but if he did, it was just a glance, as the electric light was flashed on and immediately turned and went into another room."

Mr. Rosser: "There isn't a bit of proof that he went into another room; I object again, sir; there isn't a particle of proof of that."

The Court: "Look it up and see what was said."

Mr. Dorsey: "I know this evidence."

Mr. Rosser: "If your Honor allows it to go on, there's no use looking it up. He never said anything about going into another room.

The Court: "What is your remembrance about that?"

Mr. Rosser: "It isn't true, Your Honor."

Mr. Dorsey: "I challenge you to produce it."

Mr. Rosser: "There's no use to challenge it, if he goes on and makes the argument they make, those deductions for which there's no basis; but when he makes

a mis-statemnt of the evidence, it is perfectly useless to go on and look it up; and we decline to look it up."

Mr. Dorsey: "I insist that they look it up; I insist that I am sticking to the facts."

The Court: "Well, if you'll give me the record, I'll look it up. Mr. Haas, look that up and see what is the fact about it."

Mr. Dorsey: "I know what Boots Rogers said myself."

The Court: "The jury knows what was said."

Mr. Dorsey: "That's quibbling."

Mr. Arnold: "Is that correct, Your Honor?"

The Court: "No, that's not correct; whenever they object, Mr. Dorsey, if you don't agree upon the record, have it looked up and if they are right and you know it, and you are wrong, or if they are wrong and you also know it—if they are wrong they are quibbling, and if they are right they are not quibbling; now, just go on."

Mr. Rosser: "Now, the question of whether Boots said he went into that room is now easily settled." (Mr. Rosser here read that portion of the examination of the witness Rogers, stating that when Frank left the door of the undertaking room, he went out of his view).

Mr. Dorsey: "Well, that's cross examination, ain't it?"

Mr. Rosser: "Yes, but I presume he would tell the truth on cross examination; I don't know; he passed out of his view; he didn't say he went into a room."

Mr. Dorsey: "Correct me if I'm wrong. Boots Rogers said he didn't go where the corpse lay, and that's the proposition we lay down."

Mr. Rosser: "That isn't the proposition either; now you made a statement that isn't true; the other statement isn't true. Rogers said that when he left 'he went out of my view'—he was practically out of his view all the time. I was just trying to quote the substance of that thing."

Mr. Dorsey (resuming): "He wanted to get out of the view of any man who represented the majesty and dignity of the law and he went in behind curtains or any-

thing that could hide his countenance from these men; and he said on the leading examination"—

Mr. Rosser: "I don't know what you led out of him, but on the cross he told the truth."

It will be seen from the foregoing that the Court made no ruling at all. He didn't restrain the Solicitor; he didn't correct the palpable and obvious mis-statements. It will be seen from the foregoing colloquy that the Solicitor's argument was unfounded upon the evidence. Why couldn't the Court rule upon it? Why couldn't the Court assume the responsibility of saying that either there was evidence sufficient to justify the argument or there was not?

It being a fact that there was no evidence to justify the Solicitor's claim as to what Rogers said, and it being perfectly palpable that Rogers never did undertake to swear as a positive fact that Frank didn't see the corpse, it was error to allow this argument, and of course it was injurious to the defendant.

ANOTHER MIS-STATEMENT BY THE SOLICITOR GENERAL AS TO FRANK HAVING KEY IN HIS POCKET MORNING AFTER TRAGEDY.

(Ground 100, page 118, motion for new trial).

The mis-statement which appears from the 100th Ground of the Motion for New Trial was practically admitted by the Solicitor-General. The Solicitor at first stated, to show how clearly Frank was connected with the murder, as a fact—that Frank had the key to the elevator box in his pocket.

Defendant's counsel objected, stating that there was no such evidence; that the undisputed evidence was that it was hung up in the office. After more colloquy, the Court finally made the following statement in response to defendant's counsel's objection: "He (the Solicitor) is drawing a deduction that he claims he is drawing." Mr. Rosser then replied: "He doesn't claim that; he says the point is, it was easily gotten in the office, but that is not what he said."

The Court then said: "You claim that's a deduction you are drawing?"

The Solicitor replied: "Why, sure!" I claim the power box was standing open Sunday morning."

The Court then said: "Do you insist that the evi-claim the evidence shows that?"

The Solicitor replied: "Why, sure!" I claim the power-box was standing open Sunday morning."

The Court then said: "Dou you insist that the evidence shows he had it in his pocket?"

Mr. Dorsey then replied: "I say that's my recollection, but I'm willing to waive it; but let them go to the record and the record will sustain me on that point; just like it sustains me on the evidence of this man, Rogers, which I am now going to read."

There is no line of evidence in the record that Frank had the key in his pocket. The Solicitor had at first not stated it as a deduction but had stated that Frank had the key in his pocket, as will appear from the foregoing quotation.

We submit that the Court should not have allowed the Solicitor even to argue as inference from the record, that Frank had the key in his pocket; there was no evidence to justify it whatever.

NO EVIDENCE TO SUPPORT VERDICT AND VERDICT CONTRARY TO LAW.

It is our contention that there is no evidence to support the verdict, and the verdict is contrary to law. We contend that the evidence shows no hypothesis consistent with guilt but on the contrary, an hypothesis consistent only with innocence. For these reasons the judgment overruling the motion for new trial should be reversed. In this conection we will cite the following cases, which have been reversed on the facts:

Sykes vs. State, 120 Ga. 494.
Reeves vs. State, 114 Ga. 86.
Wrinkles vs. State, 4 Ga. Ap. 559.
Seckinger vs. State, 11 Ga. Ap. 797.
Jennings vs. State, 13 Ga. App , 79 S. E. 756.

Cooper vs. State, 53 Ga. 256.
Seymour vs. State, 102 Ga. 803.
Durden vs. State, 120. Ga. 860.
Solomon vs. State, 113 Ga. 192.
McCalla vs. State, 66 Ga. 436.
Shannon vs. State, 57. 482.
Wilson vs. State, 7 Ga. App. 200.
King vs. State, 84 Ga. 524.
King vs. State, 86 Ga. 355.

In the case of Sykes vs. State, **supra**, Lamar J., says:

In all cases the burden is upon the State. It is only half carried when it establishes an hypothesis of guilt, but leaves also an hypothesis of innocence. Which of the two shall the jury take? If both theories are consistent with the proved facts the very uncertainty as to which is correct requires that the jury should give the benefit of the doubt to the defendant. But when the tables are turned and the defendant relies on the circumstantial evidence he is not obliged to remove the doubt. It is sufficient if he create a reasonable doubt. He is not obliged to prove his innocence but may rely on the failure of the State to establish his guilt. Hence, if the defendant relies on circumstantial evidence to establish his innocence and the proved facts establish an hypothesis consistent with his innocence and sufficient to creat a reasonable doubt of his guilt, this is sufficient and it is not necessary that he should go further in his proof and exclude every possible idea of his guilt.

In Reeves vs. State, **supra**, Cobb, J., says:

"It is always with reluctance that this Court orders the verdict of a jury set aside, but we do so in this instance with less reluctance because it is clearly apparent from the record that the entire truth of the transaction has not been brought to light. There is so little evidence as to the real reason and motive which actuated the accused in killing the deceased and the knowledge of the eye-witnesses who were some distance away was so limited as to this matter that we cannot help but feel that

whether the accused is guilty of murder or not something yet remains to be told. We send the case back for a new trial in the hope that the real truth of the matter may be fully developed."

In Winkles vs. State, **supra,** Hill, C. J., says:

"The learned counsel for the State admits that the evidence against the praintiff in error is not very strong and conclusive, but contends that when viewed in the light of all the surrounding circumstances, as the jury viewed it, it is sufficient to sustain a conviction and the verdict which was approved by the trial judge ought to stand.' The evidence is entirely circumstantial, and we fully concur in the opinion of the Solicitor-General that it is neither strong nor conclusive. Indeed we are sure that it has neither sufficient strength nor conclusiveness to support the verdict. When weighed most strongly against the defendant it only raises a suspicion of his guilt of the act of adultery or fornication and wholly fails to show any act or circumstance tending to prove the offense of which he was convicted. This Court is not illumined by any ray from 'the light of all the surrounding circumstances' from which counsel for the State justifies the verdict. If any such light exists, it does not shine forth from the brief of evidence and must have existed solely in the surrounding circumstances. The gossip of what Chas. Reade calls the "prurient prudes" in the neighborhood and the ready accusation of personal enemies are not sufficient to meet the requirements either of law or justice. These demand evidence of guilt; exclusive of every reasonable hypothesis of innocence, and it certainly cannot be said that this standard of conclusiveness is reached by the evidence of this case.

We therefore conclude that the conviction of the plaintiff in error of the offense charged in the indictment is wholly without any evidence to support it and that the judgment refusing him a new trial was erroneous."

In Seckinger vs. State, 11 Ga. App. 797 Hill, C. J. says:

"The evidence in support of the verdict was entirely

circumstantial and weighed most strongly against the accused raised only a bare suspicion of his guilt and was consistent with his innocence. The verdict was therefore unauthorized by law. Winkles vs. State 4 Ga. App. 559 (61 S. E. 1128); Thompson vs. State, 5 Ga. App 7 (62 S. E. 571); Moore vs. State, 8 Ga. App. 113 (68 S. E. 616).

The case of Jennings vs. State, supra, holds that the Appellate Court will look into the evidence, and unhesitatingly set aside the verdict where based on the uncorroborated testimony of an accomplice or upon hearsay testimony of another.

Judge Pottle states:

"These facts and circumstances were not sufficient to justify the conviction. In every criminal case there is a presumption of law that the accused is innocent. Added to this, is a charge of this character, there is a natural presumption that the accused would not be guilty of an offense so heinous as the one charged in the present bill of indictment. To convict, the proof must be strong enough to exclude all reasonable doubt of the innocence of the accused and to exclude every other reasonable hypothesis save that of his guilt. The accused stated that he had always felt towards the child as if she was his own daughter. The jury had a right to disregard this statement of the accused entirely, but it accords with the natural feelings the law would presumptively ascribe to a person occupying the position of the accused and would prevent his conviction, unless the proof came well up to the standard prescribed by law. . . . The accused may be guilty, but possibility of guilt is not enough to authorize his conviction. Where, as in the present case, the conviction is dependent largely upon circumstantial evidence, the circumstances must be inconsistent with innocence and must be so strong as to exclude every other reasonable hypothesis than that of his guilt. The evidence in this case did not come up to the standard of proof required by law, and for this reason the verdict of guilty should have been set aside."

In Cooper vs. State, 53 Ga. 256, it is held, where it is doubtful from all the facts and circumstances disclosed by the record whether the defendant was guilty of murder, this Court will give him the benefit of that doubt, and order a new trial, especially where the judge of the Superior Court stated, in sentencing him for the offense of murder, that he did so reluctantly.

In Seymour vs. State, 102 Ga, 803, it was held that even though in a technical sense no error was committed at the trial, the Supreme Court would grant a new trial because of their doubt that the ends of justice had not been met.

Simmons, J., says:

"After a careful and deliberate study of the evidence, we are convinced that, at most, a very weak and unsatisfactory case against the accused was made out. In view, therefore, of the fact that the main defense relied upon was not presented to the jury at the proper time and in the proper connection, and being apprehensive that, for this reason, the jury may not have given the evidence tending to show the good character of the accused the full weight and consideration it was entitled to receive, we feel constrained to order a new trial. We do so, in this instance, in the exercise of the broad power which the statute confers upon us—a power which we rarely exercise but which, in our judgment, was intended to meet just such cases as the present. **Even if, in a strict technical sense, no error was committed, we can not help feeling that the accused did not have an absolutely fair trial. Accordingly it is our judgment that the ends of justice require** a new trial. Alike result, and upon every similar considerations, was reached by this Court in the case of Matthews v. State, 56 Ga. 469."

In Wilson vs. State, 7 Ga. App. 200, it was held that where the evidence rests on the bare suspicion of guilt, and where too weak and too inconclusive to prove guilt or to exclude a reasonable hypothesis of innocence, that a verdict of conviction was without evidence to support it, and should be set aside as contrary to law.

In King vs. State, 86 Ga. 355, it was held that a conviction of murder was without evidence to support it. The Court said that the evidence while circumstantial, afforded a supposition of the guilt of the accused and showed no motive on his part to commit the crime and did not connect him therewith, nor was it sufficiently strong to exclude from the minds of the jury every reasonable doubt as to his guilt, or every reasonable hypothesis other than as to his guilt.

CONCLUSION.

We earnestly submit that a careful persual of the record will show that the evidence in support of the verdict in this case was entirely circumstantial in character, and weighed most strongly against the accused raised only the barest suspicion of his guilt and was entirely consistent with his innocence. We therefore contend that the conviction of the defendant was wholly without any evidence to support it, the verdict of guilty should have been set aside, and the judgment refusing him a new trial was therefore erroneous.

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